IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1105

ANTHONY HERBERT,

Petitioner,

—against—

BARRY LANDO, MIKE WALLACE and CBS INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

Table of Authorities

Cases:

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Opinions Below

The interlocutory decision and opinions of the United States Court of Appeals for the Second Circuit are reported at 568 F.2d 974 (2d Cir. 1977) and are set forth as Appendix A of the Petition. (1a-52a) The Memorandum and Order of the United States District Court is reported at 73 F.R.D. 387 (S.D.N.Y. 1977) and is reproduced in Appendix B of the Petition. (53a-89a) The Opinion and Order of the District Court certifying its prior Memorandum and Order is unreported and is reproduced in Appendix C of the Petition. (90a-98a)

Jurisdiction

The Petitioner asserts that the jurisdiction of this Court arises under 28 U.S.C. §1254(1) (1970).

Question Presented

Whether a ruling of the United States Court of Appeals for the Second Circuit correctly held that the First Amendment to the United States Constitution provides protection against disclosure of the editorial process of the press in pre-trial discovery conducted in a libel case governed by *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

Constitutional Provision Involved

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Statement of the Case

A. *The Protagonists and the Program*

The case arises out of a highly publicized dispute between Petitioner Anthony Herbert, a former lieutenant colonel in the United States Army, and the Army itself: Herbert claims that while on duty in Vietnam he observed and reported various war crimes to his superiors; the

Army flatly—and explicitly—denied that. Out of that extremely heated controversy, the instant litigation arises.

As summarized in the opinion of Chief Judge Kaufman, the facts giving rise to the litigation are as follows:*

> "In March 1971, Colonel Anthony Herbert achieved national importance when he formally charged his superior officers, Brigadier General John W. Barnes and Colonel J. Ross Franklin, with covering up war crimes in Vietnam. Herbert claimed, in documents filed with the U.S. Army Criminal Investigation Division (CID), that he had witnessed numerous atrocities while commanding a battalion of the 173rd Airborne Brigade. The most horrifying involved the murder of four prisoners of war by South Vietnamese police in the presence of an American advisor, who callously failed to intervene. Since those killings allegedly occurred on February 14, 1969, Herbert dubbed them the 'St. Valentine's Day Massacre.'
>
> "Herbert claimed to have reported all atrocities immediately to Colonel Franklin, deputy commander of the 173rd Airborne, at Brigade Headquarters in Vietnam, and to have brought several to the attention of

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* Judge Meskill, dissenting from the decision of the Court of Appeals for the Second Circuit, did not dispute the accuracy—or tone—of any of the facts as set forth by Judge Kaufman. Petitioner has contented himself with the observation that the description by Judge Kaufman of "the Program itself . . ., the underlying facts and the course of discovery . . . is inaccurate." (Pet. Br. 8n*-9n) Petitioner's brief does not purport to set forth in the slightest degree how or in what manner Judge Kaufman's description of the facts is "inaccurate"; instead, Petitioner observes that "*at this stage*" all such matters are "not relevant." (*Id.;* emphasis added) Apart from the dubious propriety of accusing a Court of Appeals with filling seven pages of its opinion with unstated inaccuracies, such a position is, to say the very least, inconsistent with the posture of the party who sought to persuade this Court to take the uncommon step of considering this interlocutory appeal.

the Brigade's commander, General Barnes. But, Herbert alleged, neither was interested in investigating the incidents. When Herbert persisted in pressing his charges, he said that he was abruptly relieved of his command, a determination that was subsequently affirmed by a military appeals tribunal. His removal as battalion commander was attributed to a poor efficiency report authored by Colonel Franklin, which accused Herbert of having 'no ambition, integrity, loyalty or will for self-improvement.'

"Herbert's sudden fall from grace surprised many observers. His long career in the military had been exemplary; under his strong leadership, the second battalion had exhibited extraordinary prowess in battle. His military acumen had earned Herbert one Silver and three Bronze stars, and he had recently been recommended to receive the Distinguished Service Cross.

"Herbert's story fascinated an American public that was increasingly becoming disenchanted with the Vietnam War. In July 1971, he was interviewed by Life Magazine; that September, James Wooten of the New York Times wrote an article favorable to Herbert titled 'How a Supersoldier Was Fired From His Command.' Interviews with the television personality Dick Cavett followed which, according to Cavett, elicited a level of viewer response unmatched by any other single program. In October 1971, Congress became embroiled in the 'Herbert affair' when Rep. F. Edward Hebert, Chairman of the Armed Services Committee, convinced the Army to remove Herbert's poor efficiency report from his military record.

"The Army also thoroughly investigated Herbert's charges of war crimes and, in October 1971, exonerated General Barnes. Armed with this new information, reporters began for the first time to critically examine the veracity of Herbert's story. During this period of intense public interest, Herbert announced his retirement from the service. He cited, as the reason for his decision, incessant harassment by the military because of his disclosures.

"Barry Lando, an associated producer of the CBS Weekend News, was one of the many individuals interested in the Herbert story. He interviewed Herbert in June 1971 and later produced a laudatory report which was televised on July 4, 1971 over the CBS network.[•] A year later, Lando had become a producer for CBS's documentary news program, '60 Minutes.' He decided to investigate both Herbert's military career and his charges of cover-up for a comprehensive broadcast on the ensuing controversy. Lando interviewed not only Herbert, Franklin and Barnes, but questioned others, both in and out of the military, who could corroborate Herbert's claims that he had reported war crimes, and that the military had en-

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• In his Petition for Certiorari filed with this Court, Petitioner asserted, in response to this sentence, that "[n]o such report exists." (Pet. 9n•) A reading of the Petition would suggest that Judge Kaufman had invented the entire matter. In fact, a report prepared by Barry Lando *did* exist and *was* aired on CBS on July 4, 1971.

Apparently Petitioner's sole complaint is thus with the characterization of the report as "laudatory." The report consisted primarily of an interview in which Herbert described problems he had allegedly encountered with the military. In the context of a case where the purported defamation is an alleged implicit characterization of Herbert as a liar, it seems clear that a report devoted almost entirely to his description of his views of his difficulties with those who criticized him is plainly "laudatory." More significantly for present purposes, Petitioner's failure to set forth all facts relevant to this matter is illustrative of the problem of trying to test Herbert's assertion that he has been or will be substantially handicapped in his presentation of his case in the absence of any factual findings made by the District Court and reviewed by the Court of Appeals.

gaged in a systematic whitewash. Indeed, some of the leads which Lando pursued may have been supplied by Herbert himself during their repeated and extensive conversations. Lando focused on particular allegations. He spent some time in attempting to assay whether Herbert had, in fact, reported the St. Valentine's Day Massacre to Franklin in Vietnam on February 14, 1969. Since Franklin protested that he was returning from Hawaii on that date, Lando concentrated on this point. Lando obtained Franklin's hotel bill and a cancelled check in payment of that bill, and interviewed others who could verify Franklin's activities on the crucial days. Lando also questioned Captain Bill Hill, upon whom Herbert relied to substantiate his story. When Hill recalled that Herbert reported war crimes to someone, he could not say with total certainty that Franklin was the individual.

"Other allegations were also considered. Lando investigated Herbert's activities during the eighteen-month period between his relief from command and the filing of formal war crimes charges to determine whether Herbert had apprised other officers in Vietnam of his accusations. In particular, Lando interviewed the highest ranking military lawyer and judge in Vietnam at the time, Colonel John Douglass, who emphatically controverted Herbert's assertion that war crimes had been brought to his attention. Lando also elicited from Kenneth Rosenbloom, the military attorney and investigator who conducted the Army's inquiry into Herbert's allegations, the view that the military's handling of the charges was beyond reproach.

"Lando also questioned soldiers who had served under Herbert to determine his qualities as commander. One of these, Sergeant Bruce Potter, reported occasions upon which Herbert had countenanced the

commission of war crimes. Potter recounted, for example, an incident in which Herbert had thrown a sand bag out of a helicopter to frighten a war prisoner on the ground into thinking it was a fellow prisoner who had been ejected.

"During this period, Lando received an uncorrected proof of 'Soldier,' a book written by Herbert in collaboration with James Wooten of the New York Times. Although several of those interviewed by Lando attested to the verity of many of Herbert's reports, others did not. Thus, Herbert wrote that Captain James Grimshaw had once attempted to drive certain Viet Cong soldiers from a cave without injuring female civilians and children by valiantly entering their hiding place alone. Grimshaw, however, denied the incident had occurred.

"Lando's research culminated in the telecast of 'The Selling of Colonel Herbert' on February 4, 1973. That evening, the American people were presented with a fallen hero. The presentation on the air initially juxtaposed Herbert's claims and the denials of Franklin and Barnes that Herbert ever reported war crimes, and then considered in detail five aspects of the Herbert affair:

"(1) Lando's doubts that Franklin was even present in Vietnam to hear of the St. Valentine's Day Massacre;

"(2) Colonel Douglass's adamant denial that war crimes had been reported to him;

"(3) Kenneth Rosenbloom's defense of the Army's investigation;

"(4) Bruce Potter's recount of the helicopter incident; and

"(5) James Grimshaw's flat contradiction of his alleged heroism in the cave.

"While the existence of information corroborative of Herbert's claims was alluded to on the broadcast, the program as a whole clearly cast doubt upon all of Herbert's allegations. The telecast concluded with a plea that the Army make its records public to the end of conclusively settling the imbroglio." (Pet. 13a-18a)

B. *Litigation and Discovery*

In this defamation action relating to the segment of "60 MINUTES" dealing with the Herbert-Army dispute, Herbert has sued Respondents CBS Inc. ("CBS") and Messrs. Lando and Wallace, respectively the individual producer of and correspondent for the segment.

Apart from the many factual issues as to which the parties differ,* many legal issues remain to be resolved. They

* Much of Petitioner's brief is filled with questionable and sometimes inaccurate factual materials and assertions. Many of them (such as the exhibits to Petitioner's brief) were not even before the District Court; others were not urged upon the Court of Appeals. For example—and as if this were an appeal by Herbert after a finding on the merits for CBS—Petitioner sets forth a barrage of statements designed to demonstrate that CBS portrayed Herbert as a person capable of brutality but that CBS did not present enough material rebutting that charge. (Pet. Br. 9-12) Among the many types of factual material omitted from Petitioner's brief are (a) portions of the dialogue on the program itself in which General Barnes is forced *by Lando* to admit that he had "no hard evidence" that Herbert was—as the General had alleged—a "killer" (App. 44a) and answers by Herbert himself to all charges of brutality (App. 54a, 55a); (b) the fact that statements of one witness that Herbert had beaten Viet Cong prisoners had been widely reported in newspaper accounts throughout the country prior to the "60 MINUTES" segment (Exs. 22(j), 22(k)); (c) the fact that Lando's notes of his interview with Brown confirm charges made by Stemmies about Herbert (Ex. 181, Tr. 915-17); (d) statements to the effect that Herbert had abused Ameri-

(Footnote continued on next page)

include, among others, serious questions which CBS will raise at appropriate and later stages of the case as to (a) whether the broadcast can properly be held to be defamatory, *Buckley* v. *Littell,* 539 F.2d 882 (2d Cir. 1976), *cert. denied,* 429 U.S. 1062 (1977); (b) whether, in any event, CBS may conceivably be held liable for a broadcast which is a combination of protected "neutral reportage" about the views of public figures *vis-a-vis* each other, *Edwards* v. *National Audubon Society, Inc.,* 556 F.2d 113 (2d Cir.), *cert. denied,* 98 S.Ct. 647 (1977) and protected opinion, *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323 (1974); and (c) whether Petitioner's novel theory of liability in libel cases is consistent with *any* prior ruling of this Court.*

(Footnote continued from previous page)

can enlisted men (Ex. 175, Tr. 2328-29; Ex. 34; Ex. 22l, 22ii; Ex. 32, pp. 1-10).

Similarly, in his section about Herbert's reporting of war crimes (Pet. Br. 12-14), Petitioner claims it is established that Colonel Franklin "admitted" he sometimes "tune[d]-out" when Herbert spoke with him and thus may not have heard Herbert report war crimes. What Petitioner omits is, *inter alia,* that Franklin repeatedly denied that he could have "tuned-out" on a report that six people were murdered. (Ex. 102, pp. 3, 9, 11-12) Petitioner's brief also omits reference to much material hostile to Herbert which CBS gathered but did not broadcast—*e.g.,* that one soldier described Herbert as a "ruthless man who would not hesitate to lie to preserve his own reputation" (Ex. 85) and also quoted as the reason for Herbert's removal from command Herbert's remark that "I didn't come over here to pacify these people, I came over here to kill gooks." (Ex. 178, p. 10)

These illustrations hardly exhaust the many demonstrable factual errors and omissions that fill Petitioner's brief. We cite them simply to suggest that (a) Petitioner's factual assertions may not, even on this appeal, be taken as accurate, let alone proved, and (b) there is difficulty in any review by this Court at this stage of a complex litigation where neither the District Court nor the Court of Appeals has had the opportunity to review and rule upon the Petitioner's factual allegations.

* Petitioner appears to maintain that the broadcast of statements by the participants in a controversy may give rise to some form of "libel by omission," a libel where one side is supposedly given more time and one or another allegation of the "other" side

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Whatever the areas of dispute in the case, there has been no question that Herbert is a public figure or public official—or both—and that the case is therefore governed by principles set forth in *New York Times Co.* v. *Sullivan, supra,* and its progeny.

By agreement of counsel, Herbert was permitted to begin and complete discovery of defendants Lando, Wallace and CBS before the commencement of defendants' discovery of Petitioner. Herbert's discovery began with the production of thousands of pages of documents by the defendants; Herbert's attorneys also attended screenings of the televised segment and related filmed interviews.

Herbert's deposition of Lando began on August 1, 1974 and was concluded, over a year later, subject to a ruling by the District Court on disputed areas. The deposition was exhaustive in its scope. Indeed, as summarized by Chief Judge Kaufman:

> "The sheer volume of the transcript—2903 pages and 240 exhibits—is staggering. Lando answered innumerable questions about what he knew, or had seen; whom he interviewed; intimate details of his discussions with interviewees; and the form and frequency of his communications with sources. The exhibits produced included transcripts of his interviews; volumes of reporters notes; videotapes of interviews; and a series of drafts of the '60 Minutes' telecast. Herbert also

(Footnote continued from previous page)
is omitted. *Cf. Rinaldi* v. *Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 366 N.E.2d 1299, 397 N.Y.S.2d 943, *cert. denied,* 98 S.Ct. 514 (1977). In effect, Herbert argues, libel law permits the imposition of liability for the supposed violation of what appears to be an extraordinarily altered version of the FCC's "fairness doctrine." Respondents contend that this is not the law. The Courts below have not had occasion to rule on Petitioner's theory.

> discovered the contents of pre-telecast conversations between Lando and Wallace as well as reactions to documents considered by both." (Pet. 18a-19a; footnote omitted)*

The questions to which objections were raised and which became the subject of Petitioner's Rule 37 motion relate, in the main, to matters which did not even appear in the broadcast. They involve Lando's beliefs, opinions, intent and conclusions; they range from questions designed to elicit "'Lando's conclusions during his research and investigation regarding people or leads to be pursued, or not to be pursued . . .'" to other questions which inquire into "'Lando's intentions as manifested by the decision to include or exclude material.'" (Pet. 57a-58a)

Illustrative questions include:

* Petitioner's intimation that Lando and CBS waived their First Amendment rights by responding to questions other than the ones at issue on this appeal is one which was not made to the Court of Appeals and therefore should not be considered at this time. *See, e.g., First National Bank* v. *Cities Service Co.*, 391 U.S. 253, 280 n.16 (1968). Moreover, to the extent waiver is to be at issue, it should surely be considered in the first instance by the District Court rather than by this Court. In any event, the waiver argument of Petitioner is wholly without substance. To the extent cases relied upon by Petitioner (Pet. Br. 31-32) relate to parties who commenced actions and then refused to respond to questions with respect thereto (*Anderson* v. *Nixon,* 444 F.Supp. 1195 (D.D.C. 1978); *Lyons* v. *Johnson,* 415 F.2d 540 (9th Cir. 1969), *cert. denied,* 397 U.S. 1027 (1970)), they are facially distinguishable from the instant case; and to the extent the cases involve privileges which are not constitutionally based (*Haymes* v. *Smith*, 73 F.R.D. 572 (W.D.N.Y. 1976); *Hearn* v. *Rhay,* 68 F.R.D. 574 (E.D. Wash. 1975)), they are equally inappropriate. The only other case relied upon is an unreported Maryland case (*Jenoff* v. *Hearst Corp.,* No. H75-692 (D.Md. Jan. 20, 1978)) which itself rejects the Court of Appeals' ruling at issue here—and was, we submit, incorrect in doing so for all the reasons elaborated in this brief. It should finally be noted that under *Sullivan* itself, proof of reckless disregard is, in any event, the burden of the plaintiff. (376 U.S. at 279-80)

—whether Lando had "considered making a comment" in the broadcast "about the Army or Pentagon representatives going to military installations to speak against Col. Herbert" (p. 523);*

—whether Lando had at any time proposed to include in the broadcast "a reference" to the Pentagon representatives who had spoken at Army bases with respect to Col. Herbert (p. 524);

—whether Lando "ever came to a conclusion" that it was unnecessary "to interview one individual" (p. 666);

—what "the basis" was for Lando's decision to interview one soldier three times and not to interview another soldier (p. 667);

—what "the basis" was for including in the broadcast a statement by one individual and not another regarding Herbert's treatment of Vietnamese (p. 876);

—whether Lando had "propose[d] to include in the program" certain favorable statements about Herbert (p. 877);

—and a wide variety of other questions relating to the editorial selection process by which CBS and its employees determined what to include in the "60 MINUTES" segment relating to Herbert.

When Lando, on advice of counsel, declined to respond to these and related questions, Petitioner sought an order compelling discovery pursuant to Fed.R.Civ.P. 37(a)(2).

C. *The District Court Opinion*

On January 4, 1977, the Hon. Charles S. Haight, Jr., U.S.D.J., entered a Memorandum and Order directing Re-

* References to "p...." are to pages of the Lando deposition, which was part of the record on appeal in this matter.

spondents to respond to essentially all the disputed discovery sought by Petitioner. (Pet. 53a-89a) After observing that the case was "one of first impression" (Pet. 61a), the District Court concluded that given the already "heavy burden of proof" (Pet. 61a-62a) upon a public figure plaintiff in a *Sullivan*-governed libel suit, the Petitioner was particularly entitled to "liberal interpretation of the rules concerning pre-trial discovery." (Pet. 62a) Such an interpretation, the District Court concluded—citing a ruling of Judge Lumbard in which First Amendment considerations were not even present*—would permit discovery of "'*almost anything* that will help the examining party to discover any leads to evidence.'" (Pet. 63a; emphasis added)

All claims of First Amendment protection—or even the relevance of First Amendment considerations to the scope of the discovery sought—were summarily rejected by the District Court. Cases cited by CBS to demonstrate the extraordinary breadth of protection afforded the press in its editorial decision-making process** were distinguished on their facts and rejected insofar as they were urged to set forth relevant bodies of law: "[t]hese cases", the District Court concluded, "have *nothing to do* with the proper boundaries of pre-trial discovery in a defamation suit alleging malicious publication." (Pet. 67a; emphasis added)

On February 22, 1977, having received a request from Respondents seeking certification of the decision pursuant to 28 U.S.C. § 1292(b)(1970), and an opposition thereto

* *United States* v. *Matles*, 247 F.2d 378, 383 (2d Cir. 1957), *rev'd on other grounds*, 356 U.S. 256 (1958).

** *E.g.*, *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974) (*"Tornillo"*); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973) (*"CBS"*).

from Petitioner, the District Court entered a new Memorandum Opinion and Order, amending its previous decision and making the findings required by § 1292(b) as a prerequisite to interlocutory appeal. (Pet. 90a-98a) By order entered without opinion on March 17, 1977, the United States Court of Appeals for the Second Circuit granted the petition for leave to appeal.

D. *The Decision of the Court of Appeals*

The Court of Appeals, in opinions of Chief Judge Kaufman and Judge Oakes, reversed the decision of the District Court; Judge Meskill dissented.

Judge Kaufman divided the questions at issue on appeal into five categories:*

> "1. Lando's conclusions during his research and investigations regarding people or leads to be pursued, or not to be pursued, in connection with the '60 Minutes' segment and [a subsequent magazine article by Lando];
>
> "2. Lando's conclusions about facts imparted by interviewees and his state of mind with respect to the veracity of persons interviewed;

* Although the scores of specific discovery questions at issue were included in the record on appeal, the Court of Appeals was neither asked, by either side, nor did it choose to deal with each specific question. Instead, it limited its consideration to the categories described above, leaving for the District Court the task of evaluating whether specific questions asked of Lando fell within the scope of that which the opinion held was protected under the First Amendment. *See* Pet. 46a (Opinion of Oakes, J., concurring). Another of Petitioner's newly conceived assertions to this Court is that the Court of Appeals erred in failing "to examine the materials discovered and the matters presented on the program. . . ." (Pet. Br. 8) This position is utterly inconsistent with Petitioner's failure to request any such examination below. It is, as well, at odds with Petitioner's failure to print any such material in the Appendix submitted to the Court of Appeals—or to this Court.

> "3. The basis for conclusions where Lando testified that he did reach a conclusion concerning the veracity of persons, information or events;
>
> "4. Conversations between Lando and Wallace about matter to be included or excluded from the broadcast publication; and
>
> "5. Lando's intentions as manifested by his decision to include or exclude certain material." (Pet. 19a-20a)

Both Judge Kaufman and Judge Oakes emphasized the important protection afforded the editorial process of the press by the First Amendment, a protection each found reflected in this Court's decisions in *Tornillo* and *CBS*. Analyses of those cases, this Court's holdings in *New York Times Co.* v. *Sullivan* and its progeny, and the emerging body of district and appellate court decisions dealing with procedures to be used in libel suits are set forth at length in their respective opinions and are dealt with throughout this brief. The opinions conclude that to ignore First Amendment considerations, as had the District Court, and to allow discovery of the editorial process as reflected in the five categories of questions at issue would have an impermissibly inhibiting effect on the press in the performance of its editorial functions. Accordingly, the Court of Appeals reversed the District Court's order compelling discovery as to such matters and remanded the matter to the District Court in order that the principles enunciated by the Court of Appeals might be applied to the specific questions posed in discovery.

Judge Meskill dissented. His opinion acknowledged that responses to the questions at issue would have "a 'chilling' or deterrent effect," but urged that judicial review "is supposed to" chill, since "[t]he publication of lies should be

discouraged." (Pet. 46a) Judge Meskill acknowledged that:

> "If the press were forced to disclose all of the ideas and theories that are explored during the editorial process, then intellectual exploration itself would be discouraged—without necessarily, or even probably, deterring irresponsible journalism. By thus discouraging 'the creative verbal testing, probing, and discussion of hypotheses and alternatives which are the *sine qua non* of responsible journalism,' [Pet. 13a]; *see* [Pet. 41a-42a] (Oakes, J., concurring), discovery of the communications sought under category four could have an incremental chilling effect not built into the *New York Times* v. *Sullivan* libel action." (Pet. 51a)

Nonetheless, he concluded that no protection should be afforded the press against compelled disclosure of just such communications.

Summary of Argument

In its recent rulings in cases involving the press, this Court has imposed stringent limits on all forms of governmental action which interfere with the decision-making process by which the press determines what to publish or broadcast. As phrased by the Court in *Tornillo*, "[g]overnmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers." (418 U.S. at 256) Accordingly, prior restraints on that which is to be printed or broadcast have been all but totally forbidden, as have acts of governmental compulsion as to what to print or broadcast.

The vice of the District Court's ruling in the present case was its holding that the fundamental protections which

Tornillo and other rulings of this Court secured against governmental interference with the editorial process of the press have "nothing to do" (Pet. 67a) with what degree of discovery into that same process may be judicially compelled in a *Sullivan*-governed libel case. After first setting forth the context of this appeal—*e.g.*, the enormous discovery already had, the inconsistency of still further discovery with the intentions of the drafters of the Federal Rules—Part I of this brief deals with the nature of the District Court's error and the correctness of the ruling of the Court of Appeals.

Disclosure of the editorial process of the press would inhibit the "full and candid discussion within the newsroom itself" (Pet. 11a; opinion of Kaufman, C.J.) which lies at the very heart of the editorial process. The need for protection against the compelled disclosure of decision-making processes such as the editorial process of the press which are charged with societal and constitutional significance has long been recognized for each branch of the federal government. The dangers attendant upon compelled disclosure of deliberative and mental processes are, we argue, no less real and threatening for the press.

Moreover, this Court has held on numerous occasions that exacting judicial scrutiny is required where there is even the potential that governmental action may inhibit the exercise of First Amendment rights. Application of this sensitive legal test, especially in light of the privileges accorded each branch of government to protect its deliberative processes, compels the conclusion that the Court of Appeals was correct in holding that the editorial process of the press must be protected against compelled disclosure in *Sullivan* libel cases.

Compelled disclosure of the editorial process also threatens the capacity of the press to perform its his-

torically established role as a watchdog against abuse of power by government officials and other public figures. The mutual autonomy of press and government prescribed by our Constitution is, we urge, seriously threatened by the District Court's ruling, which permits the same public officials and public figures against whom the press is to guard to compel disclosure of the editorial process by which the press decides what, if anything, to publish or broadcast about them.

By reference to pre-Revolutionary history and the history of the adoption of the First Amendment, we demonstrate that the autonomous and central role accorded the press under the press clause of the First Amendment is a direct and deeply felt response to such repressive measures as were levelled against the press in England and colonial America. The history of the press in pre-Revolutionary England and America illustrates the source and the wisdom of the press clause's protection of the autonomous communicative function of the press *vis-a-vis* government. This constitutionally critical function cannot, we submit, be performed if the government is permitted to use an equally autonomous function, such as a discovery order, to intrude into the editorial functions of the press.

In Part II of this brief, we demonstrate that the decision of the Court of Appeals is entirely consistent with the holding and underlying policies of *New York Times Co.* v. *Sullivan*. The Second Circuit's ruling, like prior decisions of other district and circuit courts, implements the substantive law of libel as set forth in *Sullivan* while protecting First Amendment interests against any threat arising from the procedural rules governing civil litigation generally. In so ruling, the Court of Appeals did not alter in any way the substantive law of libel as set forth in *Sullivan* and its progeny. Nor has the Court of Ap-

peals ruling "effectively eliminated"—as Petitioner urges (Pet. Br. 3)—the possibility that Petitioner or any other *Sullivan* plaintiff will be able to prove actual malice as defined by *Sullivan*. Actual malice in *Sullivan* libel cases typically is inferred from objective facts. If actual malice were in fact present here, Petitioner could infer from the "staggering" (Pet. 19a; opinion of Kaufman, C.J.) amount of material already discovered in this case an objective manifestation of actual knowledge of falsity or reckless disregard for the truth. As in the past, it remains open to plaintiffs in *Sullivan*-governed libel cases to prove actual malice by submitting to the jury objective facts from which inferences, if appropriate, may be drawn, without directly invading the editorial process of the press.

ARGUMENT

Introduction: The Herbert Case and Pre-Trial Discovery

Before turning to the large First Amendment issues raised by this appeal, we turn to the context out of which the appeal arises. That context is one in which elephantine discovery of Lando and CBS has already occurred; at a time of increasing recognition that discovery abuses of the Federal Rules of Civil Procedure pose an ever-growing threat to the functioning of the American judicial system; and in which the trial court nonetheless premised its opinion requiring still more discovery on its avowedly "liberal interpretation" of the discovery rules. (Pet. 62a-63a)

The enormity of the scope of the pre-trial discovery that has already transpired can hardly be disputed. Twenty-six deposition days have been devoted to the deposition of Lando alone; they consume 2,903 pages of transcript, as well as 240 exhibits. The "sheer volume of the transcript"

is, as Judge Kaufman stated and this Court may observe, "staggering." (Pet. 19a) It is filled "in minute detail" with "what Lando knew, saw, said and wrote during his investigation." (Pet. 22a)

This Court has already observed, in a context far removed from First Amendment issues, that there is immense potential for "possible abuse of the liberal discovery provisions of the Federal Rules of Civil Procedure." *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, 741 (1975).* Other courts have commented on the peculiarly threatening aspects of such discovery in a First Amendment context. In *Franchise Realty Interstate Corp.* v. *San Francisco Local Joint Executive Board,* 542 F.2d 1076 (9th Cir. 1976), *cert. denied,* 430 U.S. 940 (1977), for example, the Court of Appeals for the Ninth Circuit affirmed the dismissal with prejudice of a complaint which challenged, as violative of the antitrust laws, activities which the Court concluded were at least *prima facie* entitled to First Amendment protection as exercises of the right to associate and petition the government. In its opinion affirming the dismissal, the Court observed that:

> "The Supreme Court has consistently recognized the sensitivity of First Amendment guarantees to the threat of harassing litigation, and has erected barriers to safeguard those guarantees. *See e.g., Time, Inc.* v. *Hill,* 1967, 385 U.S. 374, 387-91, 87 S.Ct. 534, 17 L.Ed.2d 456; *New York Times Co.* v. *Sullivan,* 1964, 376 U.S. 254, 267-83, S.Ct. 710, 11 L.Ed.2d 686; *N.A.A.C.P.* v. *Button,* 1963, 371 U.S. 415, 431-33, 83 S.Ct. 328, 9 L.Ed.2d 405. Because we think that similar values are endangered in this case, we hold that in

* The Court has also indicated that the First Amendment may afford protection for otherwise discoverable material. *Fisher* v. *United States,* 425 U.S. 391, 401 (1976).

> order to state a claim for relief under the *Trucking Unlimited* exception, a complaint must include allegations of the specific activities, not protected by *Noerr,* which plaintiffs contend have barred their access to a governmental body. . . .
>
> "In holding that plaintiffs' allegations are insufficient in this case, we are not adopting a rule that so-called 'fact' pleading, as distinguished from 'notice' pleading, is required in antitrust cases. We repudiated that notion in *Walker Distributing Co.* v. *Lucky Lager Brewing Co.,* 9 Cir. 1963, 323 F.2d 1, 3-4. What we do hold is that in any case, whether antitrust or something else, where a plaintiff seeks damages or injunctive relief, or both, for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required.
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> • • •
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> "The Supreme Court seems now to be aware of a fact long known to practitioners. The liberal discovery rules of the Federal Rules of Civil Procedure offer opportunities for harassment, abuse, and vexatious imposition of expense that can make the mere pendency of a complex lawsuit so burdensome to defendants as to force them to buy their peace regardless of the merits of the case." (542 F.2d at 1082-83)*

* Still more recently, in *Maheu* v. *Hughes Tool Co.,* 569 F.2d 459 (9th Cir. 1978), the same court has had occasion to state:

> "Rule 1 of the Federal Rules of Civil Procedure, as adopted nearly 50 years ago, states the high hopes of the draftsmen: the rules 'shall be construed to secure the just, speedy, and inexpensive determination of every action.' Something in the Federal civil procedure has gone very much awry. Where now is speedy and inexpensive determination?" (569 F.2d at 462)

In this context, we submit, Judge Oakes was plainly correct in viewing the case as an invitation "to set some limits in *Sullivan* cases on the untrammeled, roving discovery that has become so prevalent in other types of litigation in today's legal world." (Pet. 25a)

"Today's legal world" referred to by Judge Oakes is one so far removed from that contemplated by the draftsmen of the Federal Rules that this case may well serve as a paradigm—and a basis for change. Charles Clark, the Reporter of the Advisory Committee appointed by the Supreme Court to draft the Federal Rules, observed prior to their passage that:

> "An important section of the proposed rules is that making provision for discovery and summary judgment in accordance with the general trend of procedural reform in England and in this country, since *these are devices which aid enormously in the speedy ascertainment of the real issues involved in litigation and their expeditious adjudication.* They are natural corollaries to supplement the system of the extremely flexible and broad pleading to which I have just referred. The requirements of pleading and allegation should not be strict, so that no person shall be deprived of his rights by the chance act or ignorance of his lawyer. *But if there results any indefiniteness about the issues or the points in dispute, it can be cleared up effectively (as no purely pleading rule has ever succeeded in accomplishing) by those devices of discovery and summary judgment which enable one upon stating his own case explicitly to obtain a like statement from his opponent—so explicit in fact that the case in half or more of the instances is ready for immediate judgment.*" (Emphasis added)

Clark, *The Proposed Rules of Civil Procedure,* 22 A.B.A.J. 447, 450 (1936).

The expectation that the new discovery rules would serve to reduce the costs, as well as the length, of litigation was given expression in treatises on discovery published at the time of the promulgation of the Rules. P.S. Dyer-Smith, for example, included as one of the "advantages of the modern, liberal discovery system," *Federal Examinations Before Trial and Depositions Practice* § 6, at 5 (1939), the following:

> "When the case goes to trial, the issues to be tried are much simpler and fewer than they would have been without discovery. Because of these reasons the time of the Court and counsel is saved, and the cost of litigation is considerably decreased, in spite of the cost of obtaining the discovery." (*Id.*)

Similarly, among the "chief benefits arising from the availability and operation of a liberal discovery procedure," 4 J. Moore, *Federal Practice* ¶ 26.02[2], at 26-65 (2d ed. 1976), listed in the first edition of Professor Moore's treatise was the following:

> "It makes available in a simple, convenient, and often inexpensive way facts which otherwise could not have been proved, except with great difficulty and sometimes not at all." (*Id.*)*

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* *See also* Sunderland, Foreword to G. Ragland, *Discovery Before Trial* (1932):

> "It is probable that no procedural process offers greater opportunities for increasing the efficiency of the administration of justice than that of discovery before trial. Much of the delay in the preparation of a case, most of the lost effort in the course of the trial, and a large part of the uncertainty in the outcome, result from the want of information on the part of litigants and their counsel as to the real nature of the respective claims and the facts upon which they rest." (*Id.* at iii)

Subsequent to the Pound Conference, actions have commenced to deal structurally with certain problems of discovery abuse.* But the instant case raises, in concrete fashion, a distinct question: whether Charles Clark and the other draftsmen who believed the Federal Rules would lead to simpler, less expensive litigations could possibly have contemplated 26 deposition days for *one* witness, a demand for still further discovery, and a district court determination requiring the additional discovery on the ground that discovery should be "liberal" and is permitted as to "'almost anything.'" (Pet. 63a) That such a decision was rendered in the name of the Federal Rules is, we submit, a perversion of the purposes of those Rules;

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generalization may be no more trustworthy than any other, it is nevertheless true—as we all know—that pre-trial procedure, and discovery in particular is often abused."

See also Stanley, *President's Page*, 62 A.B.A.J. 1375 (1976):

"Designed with the hope of eliminating the so-called sporting theory of justice, discovery practice in many cases simply transfers the battlefield from the courtroom to the pretrial stage. We depose and depose forever, with the end result that the lawsuit is tried twice—and at enormous expense."

* The American Bar Association created a Follow-Up Task Force (chaired by Attorney General Griffin B. Bell) to prepare a report on the Pound Conference. In its Report, which was submitted to the Board of Governors of the American Bar Association in August, 1976, the Task Force made several recommendations designed, *inter alia*, to correct "abuses in the use of discovery." *Report of Pound Conference Follow-Up Task Force*, 74 F.R.D. 159, 191 (1976). *See also* Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277 (1977); Bell, *The Pound Conference Follow-Up: A Response from the United States Department of Justice*, 76 F.R.D. 320 (1977). On December 2, 1977, the American Bar Association, acting through its Board of Governors, appoved the Section of Litigation's *Report of the Special Committee for the Study of Discovery Abuse* (October, 1977). The Special Committee has proposed a variety of changes be made in the Federal Rules of Civil Procedure and is currently continuing to study issues relating to discovery abuse.

As this case well demonstrates, however, what has too often developed in recent years is utterly inconsistent with the intentions of the draftsmen of the Federal Rules. Instead of producing economical and expeditious litigation, the discovery rules have led to a mire of delay and expenditure all too reminiscent of Dickens' *Jarndyce* v. *Jarndyce*.* As Chief Justice Burger has observed:

> "Now, however, after more than 35 years' experience with pretrial procedures, we hear widespread complaints that they are being misused and overused. Increasingly in the past 20 years, responsible lawyers have pointed to abuses of the pretrial processes in civil cases. The complaint is that misuse of pretrial procedures means that 'the case must be tried twice.' The responsibility for correcting this lies with lawyers and judges, for the cure is in our hands."

The Pound Conference, 70 F.R.D. 79, 95-96 (1976).**

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* C. Dickens, *Bleak House* (1853).

** *See also* Lasker, *The Court Crunch: A View from the Bench*, 76 F.R.D. 245, 249-50 (1977):

> "When on September 16, 1938 the Federal Rules of Civil Procedure became effective, it was widely considered that their lucidity, simplicity, comprehensiveness and structural unity—to say nothing of their pleading and discovery philosophy—would radically improve the litigation process in federal courts. The objective of the Rules was stated, in Rule 1, to be 'To Secure the Just, Speedy, and Inexpensive Determination of Every Action.'
>
> "Today there is a large body of opinion that in spite of the practical and beneficent aims of the Rules—and, some critics suggest, in part *because* of those aims—the federal courts and litigants face a crisis in which determinations are not always just, rarely speedy and never inexpensive." (Emphasis in original)
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> "It is widely recognized that the special irony of the success of the federal rules is that what was created for the purpose of simplification has often ended in complication. While this

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that it was rendered under the particular circumstances of this case is, as the Court of Appeals concluded, violative of the First Amendment.

I.

The Court of Appeals Correctly Held That First Amendment Protection Should Be Afforded the Press Against Being Compelled by Court Order to Disclose Its Editorial Process Decisions

A. *The Protection of the Editorial Process*

Throughout the course of this Court's rulings in First Amendment cases involving the press,* the theme has emerged with ever-increasing clarity that no governmental body may interfere with the editorial decision-making process of the press. Protections afforded the press with respect to its decision-making process as to what to print or broadcast have been sweeping. What Justice White has referred to as a "virtually insurmountable barrier" ** has been erected protecting the press from prior restraints barring publication of news or editorial articles. *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976); *New York Times Co.* v. *United States*, 403 U.S. 713 (1971); *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

* Those cases which distinguish, for certain purposes, between the constitutional rights of publishers and broadcasters—*e.g.*, *FCC* v. *Pacifica Foundation*, 46 U.S.L.W. 5018 (U.S. July 3, 1978)—do not bear upon this case. Indeed, that CBS and the journalists employed by it who prepared the "60 MINUTES" segment at issue in this case are "press" has not been—and, we believe, may not be—disputed. *See, e.g.*, *Houchins* v. *KQED, Inc.*, 46 U.S.L.W. 4830 (U.S. June 26, 1978) (access to news); *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975) (privacy); *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971) (libel).

** *Tornillo*, 418 U.S. at 259 (White, J., concurring).

Of virtually equivalent breadth and scope have been the rulings barring governmental entities from compelling the press to print what it chooses not to. The leading case in this area is, of course, the Court's unanimous ruling in *Tornillo*. *Tornillo* involved a Florida statute creating a "right of reply" to press criticism of a candidate for nomination and election. After the Florida Supreme Court ruled the statute was constitutional, this Court reversed, notwithstanding arguments to the effect that: (a) the statute would foster the First Amendment value of diversified expression; (b) media concentration had frustrated the public's right to know about news—including news of the media itself and (c) the statute would help to permit a better informed public to vote in the Florida elections. Despite all these arguments, the fact that the statute was duly adopted by the Florida legislature, and the fact that the "access" movement had received significant scholarly support,* the Court's reversal was unanimous.

The Court's *Tornillo* opinion emphasized that "[g]overnmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers." (418 U.S. at 256) Two particular vices of the statute at issue in *Tornillo* were relied upon by the Court in its decision. The first was that the statute might well inhibit speech by leading editors to conclude that controversy should be avoided. The second—and more far-reaching—conclusion of the Court related to the nature of the press and the First Amendment functions it performs:

> "Even if a newspaper would face no additional costs to comply with a compulsory access law and would not

* A compilation of the literature is contained in Lange, *The Role of the Access Doctrine in the Regulation of the Mass Media*, 52 N.C. L. Rev. 1, 2 n.5 (1973).

be forced to forego publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of materials to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment." (418 U.S. at 258)

A similar solicitude for the "exercise of editorial control and judgment" was exhibited by this Court in the *CBS* decision. In that case, which held that neither the Federal Communications Act nor the First Amendment required broadcasters to accept paid editorial advertisements, Chief Justice Burger's opinion observed that "it would be anomalous for us to hold, in the name of promoting the constitutional guarantees of free expression, that the day-to-day editorial decisions of broadcast licensees are subject to the kind of restraints urged by respondents." (412 U.S. at 120) The opinion later concluded that:

"For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt, but . . . [c]alculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility—and civility—on the part of

those who exercise the guaranteed freedoms of expression." (*Id.* at 124-25)

Similar themes are reflected in the recent opinion of Chief Justice Burger and two other members of the Court in *Houchins* v. *KQED, supra.* Emphasis was there placed upon the broad freedom of the press "to communicate information once it is obtained"; of the right "to publish information which has been obtained"; and of the related proposition that "the government cannot restrain communication of whatever information the media acquires—and which they elect to reveal." (46 U.S.L.W. at 4832)

The very breadth and scope of *Tornillo* and its progeny cause it to remain controversial.* What is undisputed is that *Tornillo* and its forbears recognize, in Justice White's phrase, that the "nerve center" of the newsroom must be protected against encroachments by government. (*Tornillo,* 418 U.S. at 261; White, J., concurring) What is disputed on this appeal is whether, as the District Court held, the inviolability of the newsroom from such encroachments has "nothing to do" with the scope of discovery to be permitted in a *Sullivan*-governed libel case.

B. *The Risk of Inhibiting the Editorial Process*

Judge Kaufman concluded that inquiries into "how a journalist formulated his judgments on what to print or not to print" would result in a "freeze on the free inter-

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* One scholar has attacked *Tornillo* as being too "absolutist"—and thus inconsistent with "other rules grounded in the First Amendment." B. Schmidt, *Freedom of the Press vs. Public Access* 13 (1976). It has, as well, been defended as correctly reflecting this Court's conclusion in a variety of cases "that the degree of First Amendment protection afforded the press depends upon the extent to which the alleged intrusion of press freedom impinges on the editorial decisionmaking process." Abrams, *In Defense of Tornillo,* Book Review, 86 Yale L.J. 361, 366-67 (1976).

change of ideas within the newsroom." (Pet. 13a) Judge Oakes similarly concluded that "[t]he critical question is whether government [by compelling disclosure of the editorial process] is impermissibly impeding the editorial function of the press; the time at which this intrusion occurs should not—it cannot—matter." (Pet. 35a; footnotes omitted) Both judges were, we believe, correct.

The ultimate inhibitory potential of governmental scrutiny with respect to the editorial process of a writer or journalist need hardly be demonstrated at any length. One may simply advert to the questioning—by counsel and courts alike—that is commonplace in societies which do not have the benefit of a functioning First Amendment. "We have learned," Justice White observed, "and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers." *Tornillo*, 418 U.S. at 259 (White, J., concurring).* Such

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* *E.g.*:

"Prosecutor: Please don't lecture us on literature. I ask you a simple, concrete question: Why did you portray Ilyich [Lenin] in such an unattractive way?

"Sinyavsky: I said that you cannot make a cult of Lenin. To me Lenin is a human being; there is nothing wrong about saying that.

"Judge: What did you mean in this passage about the deification of Stalin? (*Reads excerpts*)

"Sinyavsky: I am being ironical about making a cult of him. If Stalin had lived a little longer, it might well have come to this.

"Prosecutor: Do these three words reflect your political views and convictions?

"Sinyavsky: I am not a political writer. No writer expresses his political views through his writings. An artistic work does not express political views.

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meddling—and far worse—now occurs routinely throughout the world. Overt censorship of the press is currently

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You wouldn't ask Pushkin or Gogol about their politics. (*Indignation in the courtroom.*) My works reflect my feelings about the world, not politics.

"Prosecutor: I had a different impression. . . ."

And:

"Sinyavsky: . . . I should point out that sometimes he moves away from Lenya and at other times he comes back to him. . . .

"Prosecutor: You are trying to move away from the point!

"Sinyavsky: I'm not making fun of Communism, but of Proferansov.

"Prosecutor: And what about this: 'They have planes, but we have nothing except our naked imagination. . . .' Into whose face are you sticking this bloody hyperbole?

"Sinyavsky: This is a description of a concrete situation—an air raid on the town of Lyubimov. And Lenya Tikhomirov averts the danger by using his extraordinary mental powers.

"Judge: Field interprets that differently. And here you have the scene of a conference in the provincial party committee, and the secretary, Comrade O, says: 'And we don't want any consequences of the cult of personality.' Doesn't this express the author's attitude either? Is this a metaphor, a hyperbole? Is this something said just by Comrade O?

"Sinyavsky: In the person of Comrade O, the secretary of the provincial party committee, there is a hint of certain features of Krushchev, but it was not my intention to criticize him or his ability—I just borrowed certain of Krushchev's mannerisms—the way in which he got worked up during his speeches and used crude language.

"Prosecutor: Let's go back to your essay on *Socialist Realism*. Let's take your political views: What did you have in mind when you wrote: 'To do away with prisons, we built new prisons. . . . We defiled not only our bodies, but our souls'?

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the norm not only throughout Communist nations, but in countries including Uruguay, Chile, Brazil, Lebanon, Haiti, Pakistan, Uganda, Rhodesia, the Philippines, Angola, Colombia, Cameroon, Ghana, El Salvador, Paraguay, Nicaragua, Peru and Bermuda; within the past year journalists have been detained and interrogated in countries (in addition to nations listed above) including Argentina, Spain, South Africa, Laos, Egypt, Guatemala, Zaire, Syria, Singapore, Bangladesh, Indonesia, Taiwan, Tanzania and Turkey.*

One need not suggest that the abuses that are sadly routine abroad may or will occur in this country; indeed, the fidelity to First Amendment principles reflected in rulings of this Court such as *Tornillo* is one basis for confidence that they will not. Even in this country, however, the potential inhibiting effect of compelling responses to questions such as are at issue here is enormous. Those effects may be most obvious in the context of a congressional investigation in which a journalist is asked precisely the questions put to Mr. Lando—how and why he came to print or broadcast one story and not another.**

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What has this got to do with socialist realism?" (Footnotes omitted)

On Trial, The Soviet State versus "Abram Tertz" and "Nikolai Arzhak" 94, 105 (M. Hayward ed. 1967).

* *IPI [The International Press Institute] Report,* January 1978, at 5.

** *E.g.:*

"The Chairman: [Senator Joseph McCarthy] Have you been making attacks upon J. Edgar Hoover in the editorial columns of your paper?

"Mr. Wechsler: Sir, the New York Post has, on a couple of occasions, carried editorials critical of the Federal Bureau of Investigation. We do not regard any Government agency as above

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As phrased by Judge Kaufman: "It cannot be gainsaid that were a legislative body to require a journalist to justify his decisions in this matter, such an intrusion would not be condoned." (Pet. 22a-23a)

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criticism. I assume your committee doesn't either. . . .

"The Chairman: Have you ever, in your editorial columns, over the last 2 years, praised the FBI?

"Mr. Wechsler: Well, sir, I would have to go back and read our editorials for the last 2 years. I did not understand that I was being called down here for a discussion of Post editorial policy. I have tried to say to you what we have said editorially about the FBI.

"The Chairman: Is your answer that you do not recall at this time any praise of the FBI, but you do recall editorializing against the FBI?

"Mr. Wechsler: The statement that I made was not a criticism of the FBI. . . .

"The Chairman: Have you always been very critical of the heads of the Un-American Activities Committee? You have always thought they were pretty bad men, have you not?

"Mr. Wechsler: Well, you would have to tell me whom we were talking about. . . .

"The Chairman: . . . Have you consistently criticized the chairman of the House Un-American Activities Committee, whose task it is to expose Communists, or have you ever found one of them that you thought was a pretty good fellow, that you praised, or that you could praise as of today—a chairman?

"Mr. Wechsler: Well, if you are asking me my position on the activities of the Velde committee, my answer is that I have been editorially critical of those activities, as have many other newspapers.

"The Chairman: . . . Do you think Bill Jenner is doing a good job?

"Mr. Wechsler: I am not an enthusiast of Senator Jenner's."

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The same potential may also be evident in libel suits when a government official sues for libel and demands unrestricted discovery of those in the press who have incurred his displeasure.*

The potential for such inhibition is perhaps less evident, but no less real, when a public figure not holding government position sues, both because of the power often held by such an individual and because, in any event, the Court from which such plaintiff seeks aid in obtaining the journalists' testimony and documents is as surely "government" as is an investigating committee of the House of Representatives, the FBI or any investigatory agency. *Landmark Communications, Inc.* v. *Virginia*, 98 S.Ct. 1535 (1978). *See also Nebraska Press Ass'n* v. *Stuart, supra; Craig* v. *Harney*, 331 U.S. 367, 371 (1947).

To hold that the "probing drill of unrestrained discovery" ** may inquire into how and why the press determined what to print, whom to interview and the like thus threatens the press in two discrete, yet related, manners. First—most practically—it would inhibit what Judge Kaufman refers to as "full and candid discussion within the newsroom itself" (Pet. 11a) of "hypotheses and alternatives which are the *sine qua non* of responsible journalism." (Pet. 13a) Second—more theoretically but no less

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State Department Information Program—Information Centers: Hearings on S.Res. 40 before the Permanent Subcomm. on Investigations of the Senate Committee on Government Operations. 83d Cong., 1st Sess. 260-63 (1953).

* *Cf. Democratic National Committee* v. *McCord*, 356 F.Supp. 1394 (D.D.C. 1973) (quashing subpoena of Committee to Re-Elect the President served upon Washington journalists who had written about Watergate).

** Pet. 30a n.15 (Opinion of Oakes, J., concurring).

realistically—it would threaten the role of the press *vis-a-vis* government itself. We turn briefly to each.

1. "Full and Candid Discussion"

That the press must be encouraged and not discouraged from engaging in "full and candid discussion within the newsroom itself" (Pet. 11a) does not seem to us a seriously debatable proposition. The need for legal protection against compelled disclosure of aspects of a societally significant—and constitutionally implicated—decision-making process is hardly unique to the press. Similar protection for similar reasons has long been held required for each branch of the federal government itself.* A review of these governmental privileges demonstrates that nondisclosure of decision-making processes, including the mental processes of individual decision-makers, has been deemed essential to safeguard the very values threatened in this case: 1) the effective functioning of a constitutionally designated entity which has an overriding impact upon the general public and 2) the constitutionally mandated independence of a designated participant in our democratic system.

A constitutionally rooted executive privilege was firmly established in *United States* v. *Nixon*, 418 U.S. 683 (1974), in which this Court held that:

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* As Justice Stevens noted in *Houchins* v. *KQED, Inc., supra:*

"[W]e pointed out [in *United States* v. *Nixon*] that the Founders themselves followed a policy of confidentiality: 'There is nothing novel about governmental confidentiality. The meetings of the Constitutional Convention in 1787 were conducted in complete privacy. 1 M. Farrand, The Records of the Federal Convention of 1787, pp. xi-xxv (1911). Moreover, all records of those meetings were sealed for more than 30 years after the Convention. See 3 Stat. 475, 15th Cong., 1st Sess., Res. 8 (1818). Most of the Framers acknowledged that without secrecy no constitution of the kind that was developed could have been written. C. Warren, The Making of the Constitution 134-139 (1937).'" 46 U.S.L.W. at 4838 n.25 (1978) (Stevens, J., dissenting).

> "[T]he importance of . . . confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process." (418 U.S. at 705; footnote omitted)*

In its *Nixon* decision, this Court held that there was a "presumptive" constitutionally based executive privilege, notwithstanding the absence of an explicit reference to the privilege within the Constitution itself. The Court concluded that while the Constitution makes no explicit reference to a privilege of confidentiality, "to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based." (418 U.S. at 711) As stated by the Court:

> "The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are

* In light of this language from the *Nixon* decision as to the nature of "human experience," it is difficult to determine what further type of "proof supplied by the parties" (Pet. 52a) Judge Meskill would have deemed required to demonstrate the risks of forced disclosure as to the nature of editorial judgments. *See, e.g., Houchins* v. *KQED, Inc., supra,* 46 U.S.L.W. at 4839 n.27 (Stevens, J., dissenting).

> the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution." (*Id.* at 708; footnote omitted)

Of course, in the *Nixon* decision itself this Court held that, in the context of a criminal prosecution and subject to the careful examination by Judge Sirica of each of the documents at issue, the presumptive privilege there at issue was overcome by the need for the evidence in question. Here, however, the case is civil, not criminal; a direct constitutional conflict similar to that posed in *Nixon* is non-existent, since here a First Amendment right is pitted against a common-law cause of action not directly rooted in the Constitution;* and, in any event, the need for the evidence is (as we later demonstrate)** far less compelling than was the case in the *Nixon* litigation.

Apart from the constitutional protection afforded certain executive branch deliberations and communications, the Court in *United States* v. *Nixon* pays deference to a long-recognized common law privilege against disclosure of the mental and deliberative processes of executive decision-makers:***

* *Cf. Paul* v. *Davis,* 424 U.S. 693 (1976).

** *See, infra,* pp. 62-66.

*** The Supreme Court first announced the general bar against probing "mental processes" of administrative decision-makers in *Morgan* v. *United States,* 304 U.S. 1 (1938). In reaffirming its position in the fourth *Morgan* case, the Court declared:

> "We have explicitly held in this very litigation that 'it was not the function of the court to probe the mental processes of the Secretary.' 304 U.S. 1, 18. Just as a judge cannot be subjected to such a scrutiny, compare *Fayerweather* v. *Ritch,* 195 U.S. 276, 306-7, so the integrity of the administrative

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"'Freedom of communication vital to fulfilment of the aims of wholesome relationships is obtained only by removing the specter of compelled disclosure. . . . [G]overnment . . . needs open but protected channels for the kind of plain talk that is essential to the quality of its functioning.' *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena,* 40 F.R.D. 318, 325 (DC 1966). See *Nixon* v. *Sirica,* 159 U.S. App. D.C. 58, 71, 487 F.2d 700, 713 (1973); *Kaiser Aluminum & Chem. Corp.* v. *United States,* 141 Ct.Cl. 38, 157 F.Supp. 939 (1958) (Reed, J.); *The Federalist,* No. 64 (S. Mittell ed. 1938)." (418 U.S. at 708 n.17)

In pursuit of this mandate, courts have generally continued to foreclose judicial investigation "into the methods by which a decision is reached, the matters considered, the contributing influences, or the role played by the work of others." *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena,* 40 F.R.D. 318, 325-26 (D.D.C. 1966), *aff'd per curiam sub nom. V.E.B. Carl Zeiss, Jena* v. *Clark,* 384 F.2d 979 (D.C. Cir.), *cert. denied,* 389 U.S. 952 (1967). (footnotes omitted)*

Congress incorporated the policy protecting the deliberative processes of administrators when it exempted from disclosure under the Freedom of Information Act "inter-

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process must be equally respected." *United States* v. *Morgan,* 313 U.S. 409, 422 (1941).

Also see, Chicago, B. & Q. Ry. v. *Babcock,* 204 U.S. 585, 593 (1907); 2 K.C. Davis, *Administrative Law Treatise* § 11.05 (1958).

* For recent decisions applying the "mental processes rule," *see Graham* v. *National Transportation Safety Board,* 530 F.2d 317, 320 (8th Cir. 1976); *National Courier Ass'n* v. *Board of Governors,* 516 F.2d 1229 (D.C. Cir. 1975); *National Nutritional Foods Ass'n* v. *Food and Drug Administration,* 491 F.2d 1141 (2d Cir. 1974), *cert. denied,* 419 U.S. 874 (1975); *KFC National Management Corp.* v. *NLRB,* 497 F.2d 298 (2d Cir. 1974), *cert. denied,* 423 U.S. 1087 (1976).

agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5) (1976). Exemption 5 was itself based upon "the Government's executive privilege," *NLRB* v. *Sears, Roebuck & Co.,* 421 U.S. 132, 150 (1975); *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.,* 421 U.S. 168, 184 (1975); *EPA* v. *Mink,* 410 U.S. 73, 87-88 (1973). The "purpose of exemption 5 is not simply to encourage frank intra-agency discussion of policy, but also to ensure that the mental processes of decision-makers are not subject to public scrutiny." *Montrose Chemical Corp.* v. *Train,* 491 F.2d 63, 70 (D.C. Cir. 1974).*

Analogous protection has been afforded under the Speech or Debate Clause of the Constitution to protect members of Congress and their staffs from searching judicial scrutiny. The "central role of the Speech or Debate Clause—[is] to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary. . . ." *Gravel* v. *United States,* 408 U.S. 606, 617 (1972). In *Gravel,* this Court underscored a related policy consideration by citing Mr. Justice Harlan who observed in *Barr* v. *Matteo*:**

"[T]he 'privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid

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* *See NLRB* v. *Sears, Roebuck & Co., supra,* 421 U.S. at 150-51 ("the 'frank discussion of legal or policy matters' in writing might be inhibited if the discussion were made public; and . . . the 'decisions' and 'policies formulated' would be the poorer as a result.") (*quoting* S.Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).)

** *Barr* extended executive immunization against libel actions to a non-cabinet ranking officer. Similarly, *Gravel* extended protection of the Speech or Debate Clause to Congressional aides in order "to implement its fundamental purpose of freeing the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator." *Gravel* v. *United States, supra,* 408 U.S. at 618.

in the effective functioning of government.'" *Gravel* v. *United States, supra,* 408 U.S. at 617, *citing Barr* v. *Matteo,* 360 U.S. 564, 572-73 (1959).

The scope of the Clause is also defined in functional terms. Insofar as the Clause is construed to reach beyond actual speech or debate, the matters privileged "must be an integral part of the deliberative and communicative processes." (*Id.* at 625) The privilege covers indirect as well as direct impairment of such deliberations. *(Id.)*

Finally, a similar testimonial privilege has been afforded to members of the judiciary. In *United States* v. *Morgan, supra,* 313 U.S. at 42, the Court declared that "an examination [into the mental processes] of a judge would be destructive of judicial responsibility." *Cf. Stump* v. *Sparkman,* 98 S.Ct. 1099 (1978); *see also United States* v. *Dowdy,* 440 F.Supp. 894, 896 (W.D. Va. 1977); *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena, supra,* 40 F.R.D. at 326.

In that respect, as members of this Court have had occasion to note with approval, the Court's "own conferences [and] the meetings of other official bodies gathered in executive session" are routinely closed to the press and public. *Branzburg* v. *Hayes,* 408 U.S. 665, 684 (1972); *Pell* v. *Procunier,* 417 U.S. 817, 834 (1974); *City of Madison* v. *Wisconsin Employment Relations Commission,* 429 U.S. 167, 178 (1976) (Brennan, J., concurring); *Houchins* v. *KQED, Inc., supra,* 46 U.S.L.W. at 4838-39 (Stevens, J., dissenting).*

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* *See generally,* Rehnquist, *Sunshine in the Third Branch,* 16 Washburn L. Rev. 559, 561 (1977). Justice Rehnquist concludes that secrecy of the deliberative processes of the Court

> "permits a remarkably candid exchange of views among the members of the Conference. This candor undoubtedly advances the purpose of the Conference in resolving the cases before it.

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The press is, we submit, hardly less vulnerable than government itself to the dangers of compelled disclosure of its deliberative and mental processes.* As Judge Kaufman noted, "the lifeblood of the editorial process is human judgment. The journalist must constantly probe and investigate; he must formulate his views and, at every step, question his conclusions, tentative or otherwise." (Pet. 21a)

To all this, both Judge Meskill and the Petitioner before this Court (Pet. Br. 47-48) assert that the risk of inhibition of the press urged herein—and found present by the Court of Appeals—has not been proved with sufficient empirical evidence. As noted above, any such requirement is inconsistent with both this Court's own judgment as to the teachings of "human experience" in the *Nixon* case and with the fact that similar protection has been held by the courts to be required for each branch of government to protect its own institutional viability. It is, as well, at odds with the approach taken generally by this Court in First Amendment cases.

This Court has been acutely sensitive to any risk that governmental action itself might deter or inhibit others from the full exercise of their constitutional rights. *See, e.g., Landmark Communications, Inc.* v. *Virginia, supra,* 98 S.Ct. at 1541 (criminal sanctions for the publication by

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> No one feels at all inhibited by the possibility that any of his remarks will be quoted outside of the Conference Room, or that any of his half-formed or ill-conceived ideas, which all of us have at times, will be later held up to public ridicule." (*Id.* at 565)

* Indeed, in *Sullivan* itself, this Court concluded that "[i]t would give public servants an unqualified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves." (376 U.S. at 282-83)

a newspaper of truthful statements concerning a public official in connection with his public duties); *Elrod* v. *Burns*, 427 U.S. 347, 355-73 (1976) (practice of patronage dismissals by public officials); *Buckley* v. *Valeo*, 424 U.S. 1, 12-59 (1976) (provisions in Federal Election Campaign Act limiting various campaign expenditures by or for candidates); *Kusper* v. *Pontikes*, 414 U.S. 51, 56-61 (1973) (prohibition against voting at primary if voter has voted at primary of another political party within specified period of time); *Healy* v. *James*, 408 U.S. 169, 181-84 (1972) (denial, without justification, of request for official recognition of political campus organization by state college); *Lamont* v. *Postmaster General*, 381 U.S. 301, 305-07 (1965) (statutory postal requirement obligating addressee to request in writing that "communist political propaganda" be delivered); *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539, 543-50 (1963) (requirement that organization supply membership records); *NAACP* v. *Button*, 371 U.S. 415, 428-44 (1963) (inclusion of civil rights organization in Virginia statute prohibiting solicitation of legal business by certain specified parties); *Talley* v. *California*, 362 U.S. 60, 64-65 (1960) (requirement that names and addresses of sponsors be printed on handbills); *Bates* v. *City of Little Rock*, 361 U.S. 516, 523-27 (1960) (compulsory disclosure of membership lists); *Smith* v. *California*, 361 U.S. 147, 150-55 (1959) (ordinance imposing strict liability on bookseller of obscene book even if bookseller had no knowledge as to contents of book). *See also Louisiana ex rel. Gremillion* v. *NAACP*, 366 U.S. 293, 296-97 (1961); *Shelton* v. *Tucker*, 364 U.S. 479, 484-90 (1960); *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 460-66 (1958).

The language in many of these cases is suggestive of the fashion in which they were approached by this Court: in *Buckley*, for example, the Court concluded that exacting

scrutiny must be provided by the Court to avoid a chilling effect "even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct . . ." (424 U.S. at 65) In *Talley*, the required disclosure of names and addresses of those who wrote and/or sponsored the distribution of handbills was held unconstitutional because it "would tend to restrict freedom to distribute information and thereby freedom of expression." * (362 U.S. at 64) In *Lamont* the Court, in holding unconstitutional a postal requirement that those who wish to receive "communist political propaganda" had to request it explicitly of the Post Office, expressed concern about the fact that "any addressee is likely to feel some inhibition" at doing so: such a requirement, the Court concluded, was "at war with the 'uninhibited, robust, and wide-open' debate and discussion that are contemplated by the First Amendment." (381

* Many cases decided since *Talley* have held unconstitutional requirements of compulsory disclosure of the authors or distributors of various publications. *See, e.g., Opinion of the Justices*, 306 A.2d 18 (Me. 1973) (requirement that author of newspaper editorials be disclosed held unconstitutional); *In re Opinion of the Justices*, 324 A.2d 211 (Del. 1974) (requirement that author of newspaper editorials be signed held unconstitutional); *Wulp* v. *Corcoran*, 454 F.2d 826 (1st Cir. 1972) (ordinance requiring persons wishing to sell printed materials on street to obtain a permit and a badge held unconstitutional); *Bursey* v. *United States*, 466 F.2d 1059, 1088 (9th Cir. 1972) (grand jury investigating assassination threat against President held not entitled, in light of First Amendment, to require answers to questions as to "all persons who worked on the paper and the pamphlets, to describe each of their jobs, [and] to give the details of financing the newspaper . . ."); *Printing Industries* v. *Hill*, 382 F.Supp. 801, 809 (S.D. Texas 1974), *vacated on grounds of amendment to legislation*, 422 U.S. 937 (1975) (election statute requiring identification of "printer or publisher" of political advertising held unconstitutional since printer "may decline to print matter submitted to him by dissident or unpopular groups for fear of official or unofficial reprisals. . . .").

U.S. at 307) And in *Smith* the Court, in holding unconstitutional a criminal ordinance which, as construed by the state courts, rendered a bookseller strictly liable for the mere possession of obscene materials even if the bookseller had no knowledge as to the contents of the book, observed that such an ordinance would cause a bookseller to "tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature." (361 U.S. at 153) As the Court concluded in *Smith:* "It is plain to us that the ordinance in question, though aimed at obscene matter, has such a tendency to inhibit constitutionally protected expression that it cannot stand under the Constitution." (361 U.S. at 155)

In a variety of other areas as well, courts, in the interest of avoiding even the possibility of inhibiting protected speech, have taken the strongest steps to avoid such inhibition. Statutes have thus been held unconstitutionally overbroad on the basis of the

> "judgment of this Court that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes." *Broadrick* v. *Oklahoma,* 413 U.S. 601, 612 (1973); *see also Gooding* v. *Wilson,* 405 U.S. 518, 521 (1972).

Similarly, vague statutes which even touch upon First Amendment freedoms have been held unconstitutional on the ground that such "freedoms are delicate and vulnerable, as well as supremely precious in our society," *NAACP* v. *Button, supra,* 371 U.S. at 433, and that "[u]ncertain meanings inevitably lead citizens to '"steer far wider of the unlawful zone" . . . than if the boundaries of the forbidden areas were clearly marked.'" *Grayned* v. *City of Rockford,* 408 U.S. 104, 109 (1972).

All the First Amendment cases previously discussed in this section have in common the application of a legal test which, far from requiring certain empirical proof that particular laws or compelled responses to inquiries will inhibit the exercise of First Amendment rights, is sensitive to even the possibility of any such inhibition. Hence, legal standards which would be unthinkable in other areas of law have been routinely applied: laws that "would tend to restrict freedom" are stricken *(Talley)*; governmental practices that would "likely" make individuals "feel some inhibition" are stricken *(Lamont)*; libel law itself is constitutionalized so as to avoid "dampen[ing] the vigor" of debate *(Sullivan)*; and statutes are stricken because speech "may be muted" *(Broadrick)* and because First Amendment rights are so "delicate and vulnerable" *(Button).*

In this context, it is all the more evident that the Court of Appeals correctly concluded that there was need for First Amendment protection and that a view of the Federal Rules which permitted discovery of the editorial process of the press in *Sullivan* libel cases because discovery was permitted as to "'almost anything'" (Pet. 63a) was constitutionally unacceptable.

2. The Press vis-a-vis Government

It has often been said to be the very function of the press to serve as a "mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees," *Estes* v. *Texas,* 381 U.S. 532, 539 (1965); to function as a "powerful antidote to any abuses of power by governmental officials," *Mills* v.

Alabama, 384 U.S. 214, 219 (1966); and to guard "against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." *Sheppard* v. *Maxwell,* 384 U.S. 333, 350 (1966). As phrased with customary prescience by de Tocqueville, the press:

> "makes political life circulate in every corner of that vast land. Its eyes are never shut, and it lays bare the secret shifts of politics forcing public figures in turn to appear before the tribunal of opinion."*

One question this case poses is thus whether the same public officials and public figures against whom the press —at its best—is to guard are to be permitted to compel answers to questions at the heart of the press's decision-making process regarding what to print about them.

The mutual independence of the press and the government has long been recognized by this Court. Recently the Court has re-emphasized the lines of autonomy, permitting the press to print what it learns about government but denying the press any government-conferred privilege of special investigative access to the government itself. *Landmark Communications, Inc.* v. *Virginia, supra; Houchins* v. *KQED, Inc., supra.* One justification for this denial, Chief Justice Burger noted, is the mutuality of the press-government autonomy mandated by the Constitution. Just as the press has no claim on the government

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* A. de Tocqueville, *Democracy in America* 171 (J.P. Mayer and M. Lerner eds. 1966). De Tocqueville was not uncritical of the press. As he observed:

> "I admit that I do not feel toward freedom of the press the complete and instantaneous love which one affords to things by their nature supremely good. I love it more from considering the evils it prevents than on account of the good it does." (*Id.* at 166)

for special access to data, so "[n]o comparable pressures are available to anyone to compel publication by the media of what they might prefer not to make known." (*Houchins* v. *KQED, supra,* 46 U.S.L.W. at 4833)

In recognizing in *KQED* the mutual autonomy of press and government, Chief Justice Burger quoted with approval from Justice Stewart's seminal speech at the Yale Law School in which it was observed that as between press and government, the Constitution "establishes the contest, not its resolution." *

If—as we agree—the Constitution established a contest between press and government in which neither "contestant" was to handicap the other, it was not because prior to the Constitution antagonism between press and government was unknown. Rather, the Constitution established a contest in the same sense that the Marquis of Queensberry "established" boxing: the natural antagonism was always there; only the rules were lacking.

Before the Constitution, the press had been subject to a variety of crushing repressions which operated by regulation, both editorial and economic. The Constitution sought to even the match between press and government by forbidding the use of government's coercive power on the press's communicative functions. As Justice Stewart observed:

> "[f]or centuries before our Revolution, the press in England had been licensed, censored, and bedeviled by prosecutions for seditious libel. The British Crown knew that a free press was not just a neutral vehicle for the balanced discussion of diverse ideas. Instead, the free press meant organized, expert scrutiny of

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* Stewart, *"Or of the Press,"* 26 Hastings L.J. 631, 636 (1975), *quoted at* 46 U.S.L.W. at 4833.

government. . . . This formidable check on official power was what the British Crown had feared—and what the American Founders decided to risk." (26 Hastings L.J. at 634)

It is noteworthy that the repressive measures familiar in pre-Revolutionary England and America were far from limited to direct censorship and licensing of presses. From the introduction of the printing press in England in 1476, the English government had an astute understanding that the press functioned as an industrial and economic institution—as a business—and fashioned its regulation accordingly.* Across the Atlantic, the American colonials had occasion to learn that the press's ability to function could be grievously impaired by regulation not on its face implicating the editorial process—as for example, the infamous Stamp Act itself. In particular, aggressive government inquiry into the prepublication process was a familiar measure of repression.**

* The legal history of the press in 16th and 17th century England was surveyed in W. Holdsworth, *A History of English Law* (1924). Holdsworth demonstrates that from the inception of printing in England, the crown recognized the need of the government to maintain strict control "over the printing, publication and importation of books," in the interests of the state's "peace and security." Jurisdiction over state control of printing was vested in the Star Chamber. (Vol. 5 at 208 (3d ed. 1945)) Control was also effected at first through the Stationers Company, which was granted inherent power by the Tudors to supervise and charge fees to individual printers in exchange for helping the government suppress objectionable works. (Vol. 6 at 363-64 (2d ed. 1937)) The Stationers themselves were originally the book-purveyors, who bought the printers' wares, "the capitalists upon whom the printers depended." (*Id.* at 362-63) Patent monopolies were issued for the exclusive right of individual printers to publish on particular subjects. Thus the earliest regulation of the press was economic.

** Among the broad functions of the press-regulating Stationers Company in England were extraordinary powers of search and

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Although from the earliest date printing presses have been used to issue publications on every subject, it was particularly news publications and journalistic institutions which were the occasion for repressive measures against the press. In Frederick Siebert's classic treatment of the subject,* the English history is recounted. Siebert's analysis of materials in the British Museum demonstrates that English newspapers in the pre-Revolutionary period num-

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seizure in quest of unlicensed presses, and the responsibility for "discovering the authors or printers of any obnoxious works." Holdsworth, *supra*, Vol. 6 at 363-64. The very earliest English news publications met with hostile official inquiry into the prepublication process, but printers like Nicholas Bourne, Michael Sparke and James Bowler resisted by refusing to reveal the authors or purchasers of works they printed. F. Siebert, *Freedom of the Press in England 1476-1776* 155 (1952). The same tactic of forcing publishers to answer questions about the prepublication process was used in colonial America. *See*, for instance, the New York trial in 1770 of Alexander McDougall, who was identified under threat of imprisonment as the author of an allegedly seditious handbill by the handbill's printer, whose name was in turn betrayed after the Governor of New York offered a £150 reward for the information. L. Levy, *Freedom of the Press from Zenger to Jefferson* xlii-xliii (1966).

* F. Siebert, *Freedom of the Press in England 1476-1776, supra*, has been called "[e]asily the best book on the subject." L. Levy, *Freedom of the Press from Zenger to Jefferson, supra*, at lxxxiii. Siebert notes the wide proliferation of news publications in England and the crown's immediate and continuing reaction of pervasive control. The appearance of the first newssheets in 1621 resulted in "all the devices of the crown for the control of printing" being quickly set in motion. (Siebert, *supra*, at 151) Ensuing ordinances were directed particularly at journalistic reporting. *See id.* at 207. In 1680 public feeling was so agitated by newsbooks that King Charles II asked the kingdom's judges how far he might go in regulating them. The judges' reply, recorded in the *London Gazette*, No. 1509, May 3-6, 1680, was:

> "'That his Majesty may by law prohibit the Printing and Publishing of all News-Books and Pamphlets of News, whatsoever, not licensed by His Majesty's Authority, as manifestly tending to the Breach of Peace, and Disturbance of the Kingdom.'" (*Id.* at 298)

bered not in the dozens but in the hundreds. The highest incidence occurred in 1645, during the Puritan Revolution, when there were 722 newspapers published. (Siebert, *supra*, at 203)

Newspaper production in America was not so advanced as in England, but yet was sufficiently developed by the time of the Revolution to refute any suggestion that the pre-Revolutionary journalistic press was inconsequential. An exhaustively researched study by Arthur M. Schlesinger, Sr. documents the vitality of the pre-Revolutionary press and its crucial role in the war.* Schlesinger surveys the array of forms of communication in pre-Revolutionary America—songs, poems, pamphlets, religious sermons. He concludes:

> "Of these many ways of kneading men's minds none, however, equaled the newspapers. Published from New Hampshire to Georgia, increasing in number with the rise of American opposition, issued with clocklike regularity and reaching every segment of society, they influenced events both by reporting and abetting local patriot transactions and by broadcasting kindred proceedings in other places. The press, that is to say, instigated, catalyzed and synthesized the many other forms of propaganda and action. It trumpeted the doings of Whig committees, publicized rallies and mobbings, promoted partisan fast days and anniversaries, blazoned patriotic speeches and toasts, popularized anti-British slogans, gave wide currency to ballads and broadsides, furthered the persecution of

* *Prelude to Independence—The Newspaper War on Britain 1764-1776* (1958). Schlesinger's book has been described by historian Leonard Levy as "[t]he best account of the press, its propaganda activities, and its exercise of freedom, by one of the nation's leading historians." L. Levy, *Freedom of the Press from Zenger to Jefferson*, *supra*, at lxxxiii.

> Tories, reprinted London news of the government's intentions concerning America and, in general, created an atmosphere of distrust and enmity that made reconciliation increasingly difficult. Besides, the newspapers dispensed a greater volume of political and constitutional argument than all the other media combined." (*Id.* at 45-46)

Schlesinger's conclusions and other data* refute the conclusion that the 18th century was unfamiliar with the concept of an institutional, journalistically functioning press—a press already in "contest" with government.**

Thus, the framers of the Constitution knew what the press was, knew how crucial a role it could play in shaping government, and knew the multitude of ways in which the journalistic function could be undermined. Knowing all this, they chose to emphasize the special significance to them of liberty of the press, and to accord that liberty a central role in the litany of freedoms.

As initially introduced by James Madison in June, 1789, what became the First Amendment stated:

> "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable." 1 Annals of Congress 434 (1789).

* *See Siebert, supra.* For further account of the vitality of pre-Revolutionary journalism in the American colonies, *see* C. Duniway, *The Development of Freedom of the Press in Massachusetts* (1906), *passim.*

** *See*, for the contrary—and, we believe, unsupported—conclusion that the colonial press was "neither well-circulated nor widely read," Lange, *The Speech and Press Clauses*, 23 U.C.L.A. L. Rev. 77, 90 n.80 (1975).

Madison simultaneously proposed an amendment that "No state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." (*Id.* at 435) The Committee of the House altered this second proposed amendment by adding freedom of speech. The amendment as adopted by the House was "no State shall infringe the equal rights of conscience, nor the freedom of speech, or of the press, nor of the right of trial by jury in criminal cases." (*Id.* at 755) Madison was said to consider this "the most valuable amendment in the whole list." (*Id.*) The Senate would not, however, accept its restrictions on state powers. The ensuing compromise produced the language presently embodied in the First Amendment.*

Madison, stating his opposition to the Alien & Sedition Laws, later emphasized the central role the inclusion of the press clause of the First Amendment had played in leading to ratification of the Constitution:

> "When the Constitution was under the discussions which preceded its ratification, it is well known, that great apprehensions were expressed by many, lest the omission of some positive exception from the powers delegated, of certain rights, and of the freedom of the press particularly, might expose them to the danger of being drawn by construction within some of the powers vested in Congress; more especially of the power to make all laws necessary and proper for carrying their other powers into execution. In reply to this objection, it was invariably urged to be a fundamental and characteristic principle of the Constitution, that all powers not given by it, were reserved; that no powers were given beyond those enumerated in the Constitution, and such as were fairly incident to them; that the power over the rights in question, and *particularly over the press,* was neither among the enumerated powers, nor incident to any of them; and consequently that an exercise of any such power, would be a manifest usurpation. It is painful to remark, how much the arguments now employed in behalf of the sedition-act, are at variance with the reasoning which then justified the Constitution, and invited its ratification.
>
> "From this posture of the subject, resulted the interesting question in so many of the conventions, whether the doubts and dangers ascribed to the Constitution, should be removed by any amendments previous to the ratification, or be postponed, in confidence that as far as they might be proper, they would be introduced in the form provided by the Constitution. The latter course was adopted; and in most of the states, the ratifications were followed by propositions and instructions for rendering the Constitution more explicit, and more safe to the rights not meant to be delegated by it. Among those rights, *the freedom of the press, in most instances, is particularly and emphatically mentioned." Report on the* [*Virginia*] *Resolutions* [*of 1798*], *reprinted in* VI *The Writings of James Madison* 390-91 (Gaillard Hunt ed. 1906) (Emphasis added).

Allowing for the hyperbole sometimes involved in the heated discussion of current affairs, there is no basis for quarreling with Madison's recollections.* Virginia, for example, had ratified the Constitution with the express caveat that

* This history, and further details and background to the passage of the First Amendment, are recounted in E.G. Hudon, *Freedom of Speech and Press in America* (1963). *See especially* Chap. 1, "Adoption of the Constitution and the First Amendment."

* In *Sullivan* itself, the Court observed that "the great controversy over the Sedition Act of 1798, 1 State. 596, . . . first crys-

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"no right of any denomination can be cancelled abridged restrained or modified by the Congress by the Senate or House of Representatives acting in any Capacity by the President or any Department or Officer of the United States except in those instances in which power is given by the Constitution for those purposes: & that among other essential rights the liberty of Conscience and of the Press cannot be cancelled abridged restrained or modified by any authority of the United States." *Virginia's Resolution of Ratification, reprinted in We the States: An Anthology of Historic Documents and Commentaries Thereon, Expounding the State and Federal Relationship* 71 (1964).

Massachusetts had adopted a constitution which protected, by its terms, only "the liberty of the press," without even referring to freedom of speech.* And Pennsylvania had so emphasized the freedom of the press in its state constitutions as to dwarf the accompanying reference to freedom of speech.** There were, as well, extended discussions during the ratification process about the functions performed by the press and the need for press freedom so that those functions might be performed.***

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talized in a national awareness of the central meaning of the First Amendment." (376 U.S. at 273)

* "The liberty of the press is essential to the security of freedom in a State; it ought not, therefore, to be restrained in this Commonwealth." The history of the ratification of the Massachusetts Constitution is set forth in C. Duniway, *The Development of Freedom of the Press in Massachusetts, supra.*

** Pennsylvania's first constitution provided: "That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained." 5 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws* 3083 (F. Thorpe ed. 1909).

*** *E.g., cc, e.g.,* Richard Henry Lee, "Letter XVI, January 20, 1788," *reprinted in An Additional Number of Letters From the Federal*

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Whatever other conclusions may be drawn from the history of the adoption of the press clause of the First Amendment,* two carry special import for this case: the first is that the background to the drafting of the First Amendment was that of suppression of newspapers in England and significant dissemination of newspapers in the colonies; the second is that the press clause of the First Amendment was no afterthought, no mere appendage of the speech clause, but a deeply felt response to the deprivations of press liberty that the colonists had witnessed and to which they had been subject. In short, "[t]hat the First Amendment speaks separably of freedom of speech and freedom of the press is no constitutional accident, but an acknowledgment of the critical role played by the press in American society." *Houchins* v. *KQED, Inc., supra,* 46 U.S.L.W. at 4834 (Stewart, J., concurring).

To say this is not to denigrate the speech clause and all that it protects; it is not to elevate the press clause to supremacy above all other constitutional provisions; and it is not to say that the *only* "press" that is entitled to protection under the press clause is institutional in nature—

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Farmer to the Republican 152-53 (1962) ["A free press is the channel of communication as to mercantile and public affairs; by means of it the people in large countries ascertain each other's sentiments: are enabled to unite, and become formidable to those rulers who adopt improper measures. Newspapers may sometimes be the vehicles of abuse, and of many things not true; but these are but small inconveniences, in my mind, among many advantages. A celebrated writer, I have several times quoted, speaking in high terms of the English liberties, says, 'lastly the key stone was put to the arch, by the final establishment of the freedom of the press.'"]

* We do not suggest that all First Amendment issues may be resolved by reference to 18th Century history, any more than all 14th Amendment issues may be resolved by reference to the history of the 19th Century. *Cf. Brown* v. *Board of Education,* 347 U.S. 483, 489-93 (1954); *Regents of the Univ. of California* v. *Bakke,* 46 U.S.L.W. 4896, 4902-04 (U.S. June 28, 1978) (Opinion of Powell, J.).

the lonely pamphleteer, as well, is protected. *Lovell* v. *City of Griffin*, 303 U.S. 444 (1938).

Nor is it to deny that often the framers used the terms "freedom of speech" and "freedom of the press" interchangeably*—just as we often do. Yet the flexibility of daily usage, which has sometimes resulted in "freedom of speech" and "freedom of the press" being used interchangeably—or "freedom of expression" being used to convey both or either—does not mean that when the terms were chosen for use in the Constitution itself they were not meant to convey something precise and discrete.

What the history suggests is that, as Judge Oakes observed in his opinion, there are "*communicative functions* properly protected under the Free Press clause" (Pet. 43a n.34; emphasis added); they are the functions historically performed by newspapers (and now, as well, by broadcasters). The functions served by the press have been set forth by members of this Court on a variety of occasions;** one,—a most central one—is that of participating in a "contest" established by the Constitution itself.***

It has come to be determined that one of the rules of that contest is that the press may not force the government

* L. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* 174 (1960); *cf. First National Bank* v. *Bellotti*, 98 S.Ct. 1407, 1426 (1978) (Burger, C.J., concurring).

** *E.g., Houchins* v. *KQED, Inc., supra*, 46 U.S.L.W. at 4837-39 (Stevens, J., dissenting); *Saxbe* v. *Washington Post Co.*, 417 U.S. 843, 856-64 (1974) (Powell, J., dissenting); *Near* v. *Minnesota, supra; Mills* v. *Alabama, supra; New York Times Co.* v. *United States, supra*, 403 U.S. at 717 (Black, J., concurring).

*** As stated by Chief Justice Burger in his opinion in *Houchins* v. *KQED, Inc., supra:* "[w]e must not confuse the role of the media with that of government; each has special, crucial functions each complementing—and sometimes conflicting with—the other." (46 U.S.L.W. at 4832)

to furnish information (except to the extent that any citizen may so force the government); beyond that, gathering information is a *press* function to be left to the press itself. But surely another rule must be that the government may not use a peculiarly *governmental* function—the taxing power, as in *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936), the unlimited discovery probe, as here—to invade the editorial functions of the press. It is that which is at stake in this appeal.

II.

The Decision of the Court of Appeals Is Consistent With That in *New York Times Co.* v. *Sullivan*

It is important to recognize what the decision below did and did not do. It did not alter or in any way purport to modify the substantive rules of libel established in *Sullivan*. Rather the Second Circuit's ruling is one of a series of decisions, albeit the first in this context, made by district and circuit courts* to implement the new rules of liability announced by this Court in *Sullivan* and clarified over the last decade in its decisions.**

* *See, e.g., Cervantes* v. *Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) (discovery—confidential source); *Washington Post Co.* v. *Keogh*, 365 F.2d 965, 967-68 (D.C.Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967) (summary judgment); *Buckley* v. *New York Post Corp.*, 373 F.2d 175, 183-84 (2d Cir. 1967) *(forum non conveniens); Guitar* v. *Westinghouse Electric Corp.*, 396 F.Supp. 1042 (S.D.N.Y. 1975) (summary judgment); *cf. Franchise Realty Interstate Corp.* v. *San Francisco Local Joint Executive Board, supra* (pleading requirements where First Amendment rights involved). Petitioner is simply wrong when he asserts that "other than the rules of independent appellate review and the heavier burden of proof enunciated in *Sullivan* itself, it would be inaccurate to conclude that courts have treated the *Sullivan* principles as calling for alteration of rules of procedure." (Pet. Br. 31n*; citation omitted)

** *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976); *Gertz* v. *Robert Welch, Inc., supra; Rosenbloom* v. *Metromedia, Inc., supra; St.*

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The specific rule of liability announced in *Sullivan* was adopted to protect "robust" debate and to avoid "dampen-[ing] the vigor" "of public debate." (376 U.S. at 270, 279) But protection against ultimate liability alone cannot avoid the potentially inhibiting effect which various aspects of litigation can themselves create. In *Garrison* v. *Louisiana*, 379 U.S. 64 (1964), the Court noted that mere exposure in court of a speaker's motives erodes First Amendment functions. "Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred." (*Id.* at 73) As we noted earlier, this Court has recognized the potential burden which pretrial discovery can pose even in a context unaffected with any First Amendment interest. *Blue Chip Stamps* v. *Manor Drug Stores, supra*, 421 U.S. at 741. That burden is exacerbated in a First Amendment context. *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executives Board, supra*, 542 F.2d at 1082-83.

In the libel field itself, the Court of Appeals for the District of Columbia Circuit has observed:

> "One of the purposes of the [*Sullivan*] principle, in addition to protecting persons from being cast in damages in libel suits filed by public officials, is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights with respect to the conduct of their government." *Washington Post Co.* v. *Keogh, supra*, 365 F.2d at 968.

In *Keogh*, summary judgment was held to be a particularly appropriate manner of dealing with groundless libel suits since the mere pendency of litigation by a public official

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Amant v. *Thompson*, 390 U.S. 727 (1968); *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967).

(or public figure) may have a chilling effect.* In the present case the Court of Appeals for the Second Circuit has recognized that intrusive pre-trial discovery into the editorial process may well have a similar chilling impact, quite without regard to the merits of the underlying claim. Judge Meskill's response that the "whole idea" of libel suits is to chill "the exercise of editorial judgment" (Pet. 49a) simply misses the point; libel suits, like statutes which are impermissibly overbroad, may chill *both* protected and unprotected speech if questioning such as that at issue in this case is permitted.

The same recognition that the significance of First Amendment considerations in libel cases extends beyond the standards for liability has been recognized in a discovery context. In *Cervantes* v. *Time, Inc., supra*, the Court's concern for the damage to First Amendment protected rights which would result from application of ordinary discovery rules to a *Sullivan* libel case led it to affirm the denial of the discovery of a confidential source. In that case, St. Louis Mayor Cervantes, in the course of discovery, sought disclosure of a confidential source of information; Time, Inc. cross-moved for summary judgment, which was granted. The Court of Appeals affirmed the ruling granting summary judgment, notwithstanding its conclusion (with which we differ) that "the First Amendment does not grant to reporters a testimonial privilege to withhold news sources." (464 F.2d at 992; footnote omitted) It did so on the ground that:

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* *See also Guitar* v. *Westinghouse Electric Corp., supra*, 396 F.Supp. at 1053 ("Summary judgment is *the* rule, and not the exception, in defamation cases" (emphasis in original); *Grant* v. *Esquire, Inc.*, 367 F.Supp. 876, 881 (S.D.N.Y. 1973) (public figure plaintiff must "make a far more persuasive showing than required of an ordinary litigant in order to defeat a defense motion for summary judgment.")

"[t]o routinely grant motions seeking compulsory disclosure of anonymous news sources without first inquiring into the substance of a libel allegation would utterly emasculate the fundamental principles that underlay the line of cases articulating the constitutional restrictions to be engrafted upon the enforcement of State libel laws." (*Id.* at 993; footnote omitted)*

And it observed that:

"Where there is a concrete demonstration that the identity of defense news sources will lead to persuasive evidence on the issue of malice, a District Court should not reach the merits of a defense motion for summary judgment until and unless the plaintiff is first given a meaningful opportunity to cross-examine those sources, whether they be anonymous or

* The approach taken by the *Cervantes* court is analagous to the long-standing practice of the Federal Communications Commission not even to investigate charges of "slanting" by broadcasters, absent extrinsic evidence of a decision by a broadcast licensee to "slant" the news. As phrased by the FCC in one of its leading rulings:

"We stress that in this area of staging or distorting the news, we believe that the critical factor making Commission inquiry or investigation appropriate is the existence or material indication, in the form of extrinsic evidence, that a licensee has staged news events. Otherwise, the matter would again come down to a judgment as to what was presented, as against what should have been presented—a judgmental area for broadcast journalism which this Commission must eschew. For the Commission to investigate mere allegations, in the absence of a material indication of extrinsic evidence of staging or distortion, would clearly constitute a venture into a quagmire inappropriate for this Government agency."

Network Coverage of the Democratic National Convention, 16 F.C.C.2d 650, 657-58 (1969); *see also The Selling of the Pentagon,* 30 F.C.C.2d 150 (1971); *Hunger In America,* 20 F.C.C.2d 143 (1969).

known. For only then can it be said that no genuine issue remains to be tried. Thus, if, in the course of pre-trial discovery, an allegedly libeled plaintiff uncovers substantial evidence tending to show that the defendant's published assertions are so inherently improbable that there are strong reasons to doubt the veracity of the defense informant or the accuracy of his reports, the reasons favoring compulsory disclosure in advance of a ruling on the summary judgment motion should become more compelling. Similarly, where pre-trial discovery produces some factor which would support the conclusion that the defendant in fact entertained serious doubt as to the truth of the matters published, identification and examination of defense news sources seemingly would be in order, and traditional summary judgment doctrine would command pursuit of further discovery prior to adjudication of a summary judgment motion." (*Id.* at 994)

Here, of course, entirely aside from the District Court's failure to recognize the risks of inhibition of First Amendment rights which inexorably flow from its decision, the Court neither inquired "into the substance" of Petitioner's libel allegations, nor required any "concrete demonstration" of need for the material.

Prior to its ruling in this case, the Court of Appeals for the Second Circuit had also accommodated First Amendment interests in the context of an ongoing civil litigation. In its ruling in *Baker* v. *F&F Investment,* 470 F.2d 778 (2d Cir. 1972), *cert. denied,* 411 U.S. 966 (1973), the Court rejected an argument which would have required disclosure by journalists of their confidential sources in all federal question cases or, at least, all federal civil rights cases.

In a ruling which took account both of the needs of the party seeking discovery in a civil case and "the preferred position which the First Amendment occupies in the pantheon of freedoms" (470 F.2d at 783), the Court sustained the ruling of a district court declining to require a journalist to divulge his confidential sources. Rejecting the argument that the *Branzburg* v. *Hayes* ruling of this Court* always required disclosures of confidential sources of journalists, the Second Circuit stated:

> "If, as Mr. Justice Powell noted in [*Branzburg*], instances will arise in which First Amendment values outweigh the duty of a journalist to testify even in the context of a criminal investigation, surely in civil cases, courts must recognize that the public interest in non-disclosure of journalists' confidential news sources will often be weightier than the private interest in compelled disclosure." (470 F.2d at 785)**

In short, long prior to the instant case, standard discovery rules have been permitted to accommodate First Amendment interests.

Perhaps the most serious challenge to the decision of the Court of Appeals is the repeated contention of Petitioner that without the evidence sought on this appeal,

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* *Branzburg* rejected the argument of journalists who had witnessed crimes that they were not obliged to testify before grand juries with respect thereto. *Branzburg*, however, did not reject the concept that in civil cases a qualified First Amendment privilege might be held to exist with respect to the non-disclosure of confidential sources, and numerous later cases have held that such a privilege does exist. *See* Goodale, *Branzburg* v. *Hayes and the Developing Qualified Privilege for Newsmen*, 26 Hastings L.J. 709 (1975) and cases cited therein.

** Other courts have subsequently ruled similarly. *See, e.g.*, *Apicella* v. *McNeil Laboratories, Inc.*, 66 F.R.D. 78, 82 (E.D.N.Y. 1975); *Loadholtz* v. *Fields*, 389 F.Supp. 1299 (M.D. Fla. 1975).

"the possibility of proving liability" under *Sullivan* will be "effectively eliminated." (Pet. Br. 3) It is this which is at the heart of Petitioner's brief (pp. 19-36) and if it were, in fact, true that the decision of the Court of Appeals would have the effect Petitioner predicts, the decision of this Court would surely be a troublesome one. But, as Judge Oakes states:

> "Actual malice can be proved in a number of ways. Logical inferences from the inconsistency, say, between a television program's content and contrary facts which a plaintiff might independently establish would provide an obvious starting point for such proof. Moreover, a plaintiff might adduce circumstantial evidence from participants or interviewees on the television program. In this case, for example, documents furnished under the Freedom of Information Act indicate that Lando's state of mind may be provable without directly impinging on the editorial process. While I offer no opinion on the admissibility or adequacy of this evidence to prove actual malice, it is clear that an editor's state of mind can be examined without discovering facts at the heart of the editorial process. Limiting discovery to those matters and persons not at the heart of the editorial process does not transform the *Sullivan* rule into a nullity for putatively libeled public figures. They *can* prove actual malice without endangering the editorial process which *Tornillo* held to be protected by the First Amendment." (Pet. 39a-41a; emphasis in original, footnotes omitted). *See also* Pet. 22a (Opinion of Kaufman, C.J.).

That this statement is accurate may be seen by applying it to the present case. Here, Herbert already has been provided with an enormous—"staggering," in Judge Kaufman's language (Pet. 19a)—amount of material and information. If there were actual malice here, surely mate-

rials of this scope and nature* should reflect an objective manifestation of the actual knowledge of falsity or reckless disregard for the truth. In that respect, this Court indicated in *St. Amant* v. *Thompson, supra,* that proof of "reckless disregard" might well be adduced

> "where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will [the press] be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." (390 U.S. at 732; footnote omitted)**

* "Lando answered innumerable questions about what he knew, or had seen; whom he interviewed, intimate details of his discussions with interviewees; and the form and frequency of his communications with sources. The exhibits produced included transcripts of his interviews; volumes of reporters notes; videotapes of interviews; and a series of drafts of the '60 Minutes' telecast. Herbert also discovered the contents of pre-telecast conversations between Lando and Wallace as well as reactions to documents considered by both. In fact, our close examination of the twenty-six volumes of Lando's testimony reveals a degree of helpfulness and cooperation between the parties and counsel that is to be commended in a day when procedural skirmishing is the norm." (Pet. 19a; footnote omitted) (Opinion of Kaufman, C.J.)

** Petitioner's suggestion that plaintiffs will be unable to adduce evidence of ill will in light of the ruling of the Court of Appeals simply misses the point. (Pet. Br. 28n) This Court, in a series of rulings further explaining the *Sullivan* standard, emphasized that the "actual malice" *Sullivan* required is not ill will or bare intent to inflict harm, but intent to inflict harm through falsehood. *Greenbelt Cooperative Publishing Ass'n, Inc.* v. *Bresler*, 398 U.S. 6 (1970); *Beckley Newspapers Corp.* v. *Hanks*, 389 U.S. 81 (1967); *Rosenblatt* v. *Baer*, 383 U.S. 75 (1965); *Henry* v. *Collins*, 380 U.S. 356 (1965); *Garrison* v. *Louisiana, supra*. As a recent Wyoming case pointed out, holdings of this Court in cases such as *Beckley Newspapers Corp.* v. *Hanks, supra*, and *Rosenblatt* v. *Baer, supra*, "make it clear that bad or corrupt motives, spite, hostility, ill will,

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It has, as well, been recognized, in contexts far removed from any discussion of editorial privilege, that notwithstanding the subjective nature of the actual malice test, such state of mind "is ordinarily inferred from *objective facts*," *Washington Post Co.* v. *Keogh, supra,* 365 F.2d at 967-68 (emphasis added).*

There is, in short, no reason to believe that those libel plaintiffs who would have been able to demonstrate actual malice in the past will be prevented from doing so under the approach adopted by the Court of Appeals; on the other hand, the unacceptable threat to robust debate

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or deliberate intention to harm are not material with respect to the definition of actual malice set forth in *New York Times Co.* v. *Sullivan, supra.*" *Adams* v. *Frontier Broadcasting Co.*, 555 P.2d 556, 563 (Wyo. 1976).

* This is true, as well, in the vast majority of cases where "state of mind" is relevant, including the great bulk of criminal cases where the Fifth Amendment stands as a barrier to direct inquiry. Recognized and applied time and again by the courts is the proposition that the state of mind necessary to sustain criminal liability is "seldom provable by direct evidence but may be inferred from all the facts and circumstances of a case which reasonably tend to show a mental attitude." *United States* v. *Fleming*, 479 F.2d 56, 57 (10th Cir. 1973). The requisite state of mind can, and often must, be proved circumstantially—"inferred from conduct and circumstantial evidence, upon which reasonable inferences may be based." *United States* v. *Curtis*, 537 F.2d 1091, 1097 (10th Cir. 1976), *cert. denied*, 429 U.S. 962 (1977).

Similarly, in cases arising in the area of securities law, circumstantial evidence may itself be "highly persuasive evidence" of state of mind and may "amply demonstrat[e] defendants' guilty knowledge and intent." *Weitzman* v. *Stein*, 436 F.Supp. 895, 903-04 (S.D.N.Y. 1977). Many plaintiffs "necessarily rely upon circumstantial proof of knowledge," and state of mind may be based on "inference drawn from the evidence." *In re Equity Funding Corp. of America Securities Litigation*, [1976-77 Transfer Binder] CCH Fed.Sec.L.Rep. ¶ 95,714 at 90,474 (C.D.Cal. 1976). Given "the practical problem of proof"and the unique circumstances of each case, "[p]roof of a defendant's knowledge or intent will often be inferential." *Rolf* v. *Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 47 (2d Cir. 1978).

created by intrusive discovery into the editorial process will be avoided by that approach.

There remains the question of the scope of the protection to be afforded editorial process decisions of the press. In determining what degree of protection to afford the editorial process during discovery in a *Sullivan* libel case, the Court of Appeals had to choose from among three possible levels of protection. Judge Oakes summarized the the options as follows:

> "First, we might conclude as did the lower court that *Sullivan* has struck the ultimate appropriate balance so that the libel plaintiff must be permitted a level of discovery coterminous with the substantive law of constitutional libel. If so, then the plaintiff would be permitted to inquire into every aspect of the defendant's state of mind at the discovery stage with little or no inhibition. Second, we might decide that while *Sullivan* has generally struck the substantive balance, it does not preclude restraint on compelled discovery, specifically where First Amendment values are unnecessarily threatened by the nonconstitutional interest in liberal discovery. We could adapt the test developed in the disclosure of confidential source cases: evidence of the editorial process is discoverable only when it is *direct* evidence of a *highly* relevant matter which cannot otherwise be obtained. And finally, we might opt for the conclusion that the editorial process is subject to constitutional privilege and that actual malice must be proved by evidence other than that obtained through compelled disclosure of matters at the heart of the editorial process." (Pet. 38a-39a; emphasis in original, footnote omitted)

In concluding "that actual malice must be proved by evidence other than that obtained through compelled disclosure of matters at the heart of the editorial process" (Pet. 39a), the Court carefully considered and rejected—correctly, we believe, for the reasons set forth throughout this brief—what Judge Oakes referred to as "[t]he argument of strict logic—that the *Sullivan* test of knowing-or-reckless-falsity assumes open-ended discovery for the purpose of proving actual malice. . . ." (Pet. 39a)

Confronted, then, with the choice of whether or not the scope of the protection afforded the editorial process should be qualified, the Court rejected the "compromise position" (Pet. 43a) not only because of the inhibitory effect engendered by any compulsory disclosure of the editorial process, but also in light of the inherent vagueness and difficulty of application of a qualified privilege. As Judge Oakes concluded: "In effect, the discovery process itself, and the resulting litigation over the 'directly-related,' 'highly-relevant' and 'otherwise-unobtainable' standards, are not merely likely to make editors more cautious, but inevitably will require them to be." (Pet. 43a-44a)*

CONCLUSION

This appeal plainly involves far more than whether one journalist in one case should be obliged to be deposed for still a 27th day, notwithstanding the fact that the extraordinary length of the deposition itself is suggestive of the need, at long last, to call it to a halt. Nor are the issues raised ones which are unique to this case or its facts or its parties. Whatever this Court's decision, the ruling will be as

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* A qualified protection of the editorial process was also rejected because such an approach was developed in an entirely different context from the present case—namely, where "the information sought to be disclosed, whether or not vital to the plaintiff's case, was far removed from the editorial process." (Pet. 44a) *See Baker* v. *F&F Investment, supra; Garland* v. *Torre*, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).

applicable in libel actions by powerful public officials as it is to this plaintiff and as applicable to suits against small and easily threatened defendants as it is to these defendants.

Much of the unhappiness of the experiences of journalists abroad has been in the area of interrogation—of being required to respond to official inquiries as to why certain material was printed rather than other material. The District Court opinion in this case would have—apparently routinely—permitted just such inquiries by public officials and public figures who have commenced libel actions. Based upon decisions of this Court, the Court of Appeals reversed, and in so doing, eloquently reaffirmed First Amendment principles. We urge this Court to affirm that ruling.

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Dated: July 31, 1978